

No. 16109 ✓

United States
Court of Appeals
for the Ninth Circuit

MARGARET LILLIAN FERGUSON, NEWTON
IVAN SHERRY and LOIS SHERRY,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of Record

Petition to Review Decisions of The Tax Court
of the United States

FILED

OCT - 1 1958

PAUL P. O'BRIEN, CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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403 Subway Terminal Building,
Los Angeles 13, California,
Attorney for Petitioners.

CHARLES K. RICE,
Assistant Attorney General,
Tax Division,
Department of Justice,
Washington 25, D. C.,
Attorney for Respondent.



The Tax Court of the United States

Docket No. 56085

MARGARET LILLIAN FERGUSON,
Petitioner,

vs. .

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES

1955

Jan. 24—Petition received and filed. Taxpayer notified. Fee paid.

Jan. 26—Copy of petition served on General Counsel.

Jan. 24—Request for Circuit hearing in Los Angeles, Calif. filed by taxpayer. 2/2/55—Granted.

Mar. 15—Answer filed by General Counsel.

Mar. 21—Copy of answer served on taxpayer, Los Angeles, Calif.

May 2—Reply to answer filed by taxpayer. Copy served.

1956

Oct. 19—Hearing set Jan. 7, 1957—Los Angeles, Calif.

Dec. 19—Motion to continue to the next Los Angeles calendar, filed by petitioner, 12/20/-56—Granted.

Dec. 21—Motion Served.

1957

Feb. 20—Hearing set Apr. 15, 1957—Los Angeles, Calif.

Apr. 15—Trial had before Judge Raum on joint oral motion to consolidate with 56086 for trial—Granted. Stipulation of facts filed at Hearing, Petitioner's Brief due 5/31/57; Respondent's Brief due 7/1/57; Petitioner's Reply Brief due 7/22/57.

May 8—Transcript of Hearing 4/15/57 filed.

May 31—Brief filed by Petitioner. Served 5/31/57.

Jun. 28—Respondent's Brief in answer filed. 7/2/57 served.

July 19—Petitioner's Reply Brief filed. Served 7/22/57.

1958

Feb. 26—Memo. Findings of Fact and Opinion filed, Judge Raum, Decision under R. 50. Served 2/26/58.

May 14—Agreed computation filed.

May 19—Decision entered, Judge Raum.

Jun. 16—Petition for Review by U. S. Ct. of Ap. 9th Cir. filed by petitioner.

Jun. 16—Designation of contents of record on review filed.

Jun. 16—Proof of service of petition for review and designation filed.

The Tax Court of the United States

Docket No. 56086

NEWTON IVAN SHERRY, LOIS SHERRY,
Petitioners,
vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES

[Note: Docket Entries for case No. 56086 are
a duplication of Docket Entries for case No.
56085.]

[Title of Tax Court and Cause No. 56085.]

PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency dated October 28, 1954, and as a basis of her proceeding alleges as follows:

1. Petitioner is an individual with residence at 1810 Courtney Avenue, Los Angeles 46, California. The returns for the years here involved were filed with the Collector at Los Angeles, California.

2. The Commissioner has addressed the statutory notice to petitioner as "Mrs. Robert W. Ferguson (formerly Margaret Lillian Sherry)." Although petitioner is married to Robert W. Ferguson, her

correct name is Margaret Lillian Ferguson, and this petition is filed under the latter name.

3. The notice of deficiency (a copy of which is attached and marked Exhibit "A") was mailed to the petitioner on October 28, 1954.

4. The deficiency as determined by the Commissioner is in income taxes as follows:

Year	Deficiency	50% Penalty
1944	\$ 5,817.27	\$ 2,908.63
1945	5,124.55	3,117.15
1946	45,333.52	22,666.76
	<hr/>	<hr/>
	\$56,275.34	\$28,692.54

All of the above tax deficiencies and penalties are in controversy.

5. The determination of tax set forth in said notice of deficiency is based upon the following errors:

(a) The Commissioner has erroneously determined said deficiencies and penalties because the statute of limitations under Section 275 of the Internal Revenue Code of 1939 has run on all of the above years;

(b) The Commissioner has erroneously determined that an alleged partnership called Sherry Enterprises existed and that petitioner was a partner therein;

(c) The Commissioner has erroneously determined that the increase in net worth of said alleged partnership was the result of income received by such partnership;

(d) The Commissioner has erroneously used the "net worth" method to determine said deficiencies;

(e) The Commissioner has erroneously determined that petitioner received income from said alleged partnership during said years; and

(f) The Commissioner has erroneously added fraud penalties to said deficiencies. There was no intent to evade payment of income taxes.

6. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) Petitioner's income tax returns for the above years were filed with said Collector on or before the following dates:

1944—March 15, 1945.

1945—March 15, 1946.

1946—March 16, 1947.

The statute of limitations (section 275 of the Internal Revenue Code of 1939) has run, therefore, on all of the above years.

(b) Petitioner was not a partner in any partnership known as Sherry Enterprises because there was, in fact, no such partnership. But even if this Court should determine that such partnership did exist, petitioner was not a partner therein. Petitioner was on active duty with the United States Navy from February, 1943, to November, 1945, and from February, 1946, to June, 1946, she attended the University of Southern California. Petitioner did not participate in the transactions or businesses involving the alleged Sherry Enterprises during any of the above taxable years. She also did not

receive any money or property from the alleged partnership during any of said years, either as the income of such partnership or otherwise.

(c) If it should be determined that such alleged partnership did exist, petitioner alleges that the partnership kept adequate books and records during said years which clearly reflect its income. Hence the Commissioner erroneously reconstructed the income of the alleged partnership by using the "net worth" method.

(d) Further, that in the event this Court determines that such alleged partnership did exist during the above years and that petitioner was a partner therein, petitioner alleges that the increase in net worth of such partnership over and above the income reported by the partnership in its tax returns was the result of capital contributions by Nathan Sherry, the deceased father of petitioner, and not as the result of income earned or received by the partnership. During said years Nathan Sherry made the following capital contributions to the alleged partnership:

	Fiscal Years Ending		
	6-30-44	6-30-45	6-30-46
Cash	\$ 74,663.60	\$ 4,348.00	\$ 42,000.00
Bonds	5,000.00	5,000.00	40,000.00
Interest in partnerships		4,572.50	62,211.50
Cashier's checks			60,000.00
Real Estate		17,500.00	3,000.00
Notes and Accounts Receivable			5,000.00
Furniture and Fixtures			2,120.00
Other			30,000.00
Totals.....	\$ 79,663.60	\$31,420.50	\$244,331.50

Also, the Commissioner has erroneously included as an accounts receivable of the alleged partnership on June 30, 1946, the amount of \$30,000.00 as an accounts receivable due from Edward J. Margett. Edward J. Margett did not owe the alleged partnership the sum of \$30,000.00 or any other amount on June 30, 1946.

Wherefore, the petitioner prays that this Court may hear the proceedings and determine that there is no deficiency due from the petitioner for the years 1944 to 1946, inclusive.

/s/ CHARLES H. CARR

/s/ WILLIAM K. RASMUSSEN,
Counsel for Petitioner

Duly Verified.

EXHIBIT "A"

1250 Subway Terminal Building, 417 South Hill
Street, Los Angeles 13, California

Ap:LA:AA:PAK

90D.

Oct. 28, 1954

Mrs. Robert W. Ferguson

(Formerly Margaret Lillian Sherry)

1810 Courtney Street, Los Angeles, California

Dear Mrs. Ferguson:

You are advised that the determination of your income tax liability for the taxable years ended December 31, 1944, December 31, 1945, and December 31, 1946 discloses deficiencies in tax aggregating \$56,275.34 and penalties aggregating \$28,692.54, as shown in the statement attached.

Exhibit "A"—(Continued)

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiencies mentioned.

Within 90 days from the date of mailing of this letter you may file a petition with The Tax Court of the United States, at its principal address, Washington 4, D. C., for a redetermination of the deficiency. In counting the 90 days you may not exclude any day unless the 90th day is a Saturday, Sunday, or legal holiday in the District of Columbia, in which event that day is not counted as the 90th day. Otherwise Saturdays, Sundays, and legal holidays are to be counted in computing the 90-day period.

Should you not desire to file a petition, you are requested to execute, in duplicate, the enclosed form and forward it to the Assistant Regional Commissioner, Appellate, 1250 Subway Terminal Building, 417 South Hill Street, Los Angeles 13, California. The signing and filing of this form will expedite the closing of your returns by permitting an early assessment of the deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after receipt of the form, or on the date of assessment, or on the date of payment, whichever is earliest.

Very truly yours,

T. COLEMAN ANDREWS,

Commissioner of Internal Revenue

/s/ By W. T. TIGNOR,

Associate Chief, Appellate Division

Exhibit "A"—(Continued)

Enclosures: Statement, Form 1276, Agreement Form.

PAKar:lee 10/8/54

Statement

Ap:LA:AA-PAK

Mrs. Robert W. Ferguson (formerly Margaret Lillian Sherry),
1810 Courtney Street, Los Angeles, California

Tax Liability for the Taxable Years Ended December 31, 1944,
to December 31, 1946, Inclusive

Year	Deficiency	50% Penalty
1944	Income tax.....\$ 5,817.27	\$ 2,908.63
1945	Income tax.....5,124.55	3,117.15
1946	Income tax.....45,333.52	22,666.76
Total.....		\$56,275.34 \$28,692.54

In making this determination of your income tax and penalty liability careful consideration has been given to the report of examination dated November 24, 1952, to your protest dated February 24, 1953, and to the statements made at hearings held on January 27, 1954 and July 16, 1954.

The 50 percent penalty has been asserted for each of the taxable years 1944, 1945, and 1946 under the provisions of section 293(d) of the Internal Revenue Code of 1939.

The deficiency for the year 1944 is assessable under the provisions of section 276(a) of the Internal Revenue Code of 1939.

The deficiencies for 1945 are assessable under the provisions of section 275(c) and 276 of the Internal Revenue Code of 1939.

It has been determined that your share of the distributable income from the Sherry Enterprises partnership is \$23,940.84 for 1944, \$29,889.98 for 1945, and \$82,742.97 for 1946. Inasmuch as you reported \$13,100.14 in 1944, \$21,841.88 in 1945, and \$14,792.91 in 1946, your taxable income has been increased by the differences of \$10,840.70, \$8,048.10, and \$67,950.06, respectively, computed as follows:

Exhibit "A"—(Continued)

COMPUTATION OF NET WORTH OF PARTNERSHIP

Assets

	Oct. 1, 1943	Jun. 30, 1944	Jun. 30, 1945	Jun. 30, 1946
Cash	\$12,094.96	\$ 10,322.24	(\$ 363.71)	\$ 28,176.59
Stocks	5,997.88	.....	.....	.....
Bonds .....	.....	50,000.00	50,000.00	50,000.00
Interest in partnership	49,577.70	90,712.18	133,424.34	348,326.34
Cashier's checks .....	.....	.....	2,000.00	60,000.00
Real estate .....	.....	.....	118,020.42	94,619.50
Notes and accounts receivable .....	.....	50,000.00	30,000.00	42,400.00
Furniture and fixtures .....	.....	.....	.....	6,743.55
Total Assets	\$67,670.54	\$201,034.42	\$333,081.05	\$630,265.98

Liabilities:

Accounts payable	\$ 5,000.00	\$ 403.34	\$	\$ 15,000.00
Notes payable .....	.....	45,000.00	40,000.00	.....
Trust deed payable....	.....	.....	21,400.00	17,500.00
Total Liabilities	\$ 5,000.00	\$ 45,403.34	\$ 61,400.00	\$ 32,500.00
Net Worth	\$62,670.54	\$155,631.08	\$271,681.05	\$597,765.98

	1944	1945	1946
Net worth at end of year.....	\$155,631.08	\$271,681.05	\$597,765.98
Net worth at beginning of year	62,670.54	155,631.08	271,681.05

Increase in net worth	\$ 92,960.54	\$116,049.97	\$326,084.93
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Additions:

Personal expenses	1,248.14	6,883.00	12,127.62
Federal income tax payments	6,486.08	23,324.89	22,397.86
State income tax payments....	.....	573.70	.....
Payment to stock brokers	10,000.00	900.00	1,915.00
Purchase of personal items..	.....	.....	6,911.01
Total	\$110,694.76	\$147,731.56	\$369,436.42

Reductions:

Proceeds of sale of auto....	1,500.00	.....	.....
Proceeds of sale of stock.....	.....	2,498.50	.....

Exhibit "A"—(Continued)

	1944	1945	1946
Capital contributions .....	.....	12,040.00	5,000.00
Earnings prior to Oct. 1, 1943	13,431.40	.....	.....
Check from brokers .....	.....	10,614.31	.....
	<hr/>	<hr/>	<hr/>
Balance	\$ 95,763.36	\$122,578.75	\$364,436.42
Add: Income adjustments:			
Ordinary income of partner-			
ship .....	.....	.....	1,170.00
Short-term capital gain .....	.....	( 5,000.00)	(277.00)
Long-term capital gain—			
taxable portion .....	.....	( 3,989.17)	(17,178.78)
Long-term capital gain—			
nontaxable portion .....	.....	( 3,989.17)	(17,178.78)
	<hr/>	<hr/>	<hr/>
Ordinary net income corrected..	\$ 95,763.36	\$109,600.41	\$330,971.86
Ordinary net income per return	52,400.54	77,407.99	59,171.64
	<hr/>	<hr/>	<hr/>
Understatement of net income	\$ 43,362.82	\$ 32,192.42	\$271,800.22
Your distributive share of amount			
of understatement	\$ 10,840.70	\$ 8,048.10	\$ 67,950.06

A copy of this letter and statement has been mailed to your representative, Mr. Charles H. Carr, 417 South Hill Street, Los Angeles 13, California, in accordance with the authority contained in the power of attorney executed by you.

Taxable Year Ended December 31, 1944

ADJUSTMENT TO NET INCOME

Net income as disclosed by return.....	\$ 12,600.13
Additional income:	
(a) Income from partnership	10,840.70
	<hr/>
Net income adjusted	\$ 23,440.83

EXPLANATION OF ADJUSTMENT

(a) This adjustment is previously explained herein.

COMPUTATION OF TAX

Net income adjusted	\$ 23,440.83
Less: Surtax exemption	500.00
	<hr/>
Surtax net income	\$ 22,940.83

Exhibit "A"—(Continued)

Net income adjusted	\$ 23,440.83
Less: Normal tax exemption	500.00
<hr/>	
Net income subject to normal tax.....	\$ 22,940.83
Normal tax at 3% of \$22,940.83	\$ 688.23
Surtax on \$22,940.83	8,935.10
<hr/>	
Total normal tax and surtax.....	\$ 9,623.33
Correct income tax liability	\$ 9,623.33
Income tax liability shown by return, Account No. 9016323	3,806.06
<hr/>	
Deficiency of income tax	\$ 5,817.27
50 percent penalty	2,908.63

Taxable Year Ended December 31, 1945

ADJUSTMENTS TO NET INCOME

Net income as disclosed by return.....	\$ 21,449.28
Additional income:	
(a) Income from partnerships	10,537.98
<hr/>	
Total.....	\$ 31,987.26
Reductions:	
(b) Long-term capital gain	742.15
Net income adjusted	\$ 31,245.11

EXPLANATION OF ADJUSTMENTS

(a) Income from partnerships is increased by \$10,537.98 consisting of the following:

(1) Income from Sherry Enterprises (partnership) \$	8,048.10
(2) Income from other partnerships	2,489.88

Total.....\$ 10,537.98

(1) This adjustment is previously explained herein.

(2) This adjustment was previously made to net income and agreed to by you.

(b) This adjustment was previously made to net income and agreed to by you.

Exhibit "A"—(Continued)

COMPUTATION OF ALTERNATIVE TAX

Net income adjusted	\$ 31,245.11
Less: Excess of net long-term capital gain over net short-term capital loss	255.14
Ordinary income	\$ 30,989.97
Less: Surtax exemption	500.00
Surtax net income	\$ 30,489.97
Ordinary net income	\$ 30,989.97
Less: Normal-tax exemption	500.00
Balance subject to normal tax.....	\$ 30,489.97
Normal tax at 3% of \$30,489.97	\$ 914.70
Surtax on \$30,489.97	13,523.79
Partial tax	\$ 14,438.49
Plus: 50% of \$255.14	127.57
Alternative tax	\$ 14,566.06

COMPUTATION OF TAX

Net income adjusted	\$ 31,245.11
Less: Surtax exemption	500.00
Balance subject to surtax	\$ 30,745.11
Net income adjusted	\$ 31,245.11
Less: Normal-tax exemption	500.00
Net income subject to normal tax.....	\$30,745.11
Normal tax at 3% of \$30,745.11.....	\$ 922.35
Surtax on \$30,745.11	13,681.97
Total normal tax and surtax.....	\$ 14,604.32
Alternative tax	\$ 14,566.06
Correct income tax liability	\$ 14,566.06
Income tax liability shown on return, Account No. 3040632	\$ 8,331.76
Additional, Oct. 1, 1948, No. 10-510047	1,109.75
Deficiency of income tax	\$ 5,124.55

Exhibit "A"—(Continued)

50% penalty:

Correct income tax liability\$14,566.06

Liability shown by return 8,331.76

Excess\$ 6,234.30

50% penalty (50% of \$6,234.30)\$ 3,117.15

Taxable Year Ended December 31, 1946

ADJUSTMENT TO NET INCOME

Net income as disclosed by return.....\$ 18,656.85

Additional income:

(a) Income from partnership 67,950.06

Net income adjusted\$ 86,606.91

EXPLANATION OF ADJUSTMENT

(a) This adjustment has been previously explained herein.

COMPUTATION OF ALTERNATIVE TAX

Net income adjusted\$ 86,606.91

Less: Excess of net long-term capital gain over net
short-term capital loss 4,294.70

Ordinary net income\$ 82,312.21

Less: Exemption 500.00

Balance, subject to surtax and normal tax.....\$ 81,812.21

Tentative surtax\$ 49,287.89

Tentative normal tax at 3%..... 2,454.36

Total tentative tax\$ 51,742.25

Less 5% 2,587.11

Partial tax\$ 49,155.14

Plus: 50 percent of \$4,294.70 2,147.35

Alternative tax\$ 51,302.49

COMPUTATION OF TAX

Net income adjusted\$ 86,606.91

Less: Exemption 500.00

Balance, subject to surtax and normal tax.....\$ 86,106.91

Exhibit "A"—(Continued)

Tentative surtax	\$ 52,766.60
Tentative normal tax at 3%.....	2,583.20
<hr/>	
Total tentative tax	\$ 55,349.80
Less 5%	2,767.49
<hr/>	
Total normal tax and surtax.....	\$ 52,582.31
Alternative tax	\$ 51,302.49
Correct income tax liability	\$ 51,302.49
Income tax liability shown on return, Account No. 3036202	\$ 5,968.97
<hr/>	
Deficiency of income tax	\$ 45,333.52
50% penalty	\$ 22,666.76

[Endorsed]: T.C.U.S. Filed January 24, 1955.

[Title of Tax Court and Cause No. 56085.]

ANSWER

The Commissioner of Internal Revenue, by his attorney, R. P. Hertzog, Acting Chief Counsel, Internal Revenue Service, for answer to the petition of the above-named taxpayer, admits, denies and alleges as follows:

1, 2, 3, 4. Admits the allegations contained in paragraphs 1, 2, 3, and 4 of the petition.

5. Denies the allegations of error contained in paragraph 5 of the petition, and all subparagraphs thereof.

6. (a) Denies the allegations of subparagraph (a) of paragraph 6 of the petition; avers that petitioner's income tax returns for the years 1945 and 1946

were filed with said Collector on March 15, 1946 and March 15, 1947, respectively.

(b), (c), (d). Denies the allegations contained in subparagraphs (b), (c), and (d) of paragraph 6 of the petition.

7. Denies generally and specifically each and every allegation contained in the petition, not hereinbefore specifically admitted, qualified or denied.

Further answering the petition, the respondent alleges that:

8. The petitioner is liable for the fifty percent fraud penalties proposed under Section 293(b) of the Internal Revenue Code of 1939 for the taxable years 1944, 1945 and 1946 in the respective amounts of \$2,908.63, \$3,117.15, and \$22,666.76 as determined by the Commissioner and set forth in his notice of deficiency. In support of the Commissioner's determination of such fraud penalties, the respondent alleges and relies upon the following facts:

(a) That petitioner caused to be prepared and filed with the Collector of Internal Revenue for the Sixth District of California individual income tax returns for the taxable years 1944, 1945 and 1946 and represented that each such return was a true, correct return.

(b) In truth and in fact, each of the said returns filed by the petitioner for the taxable years 1944, 1945 and 1946 was false and fraudulent in that they understated the true and correct amounts of net income and resultant tax liability thereon for each of such taxable years. The extent of the false and

fraudulent understatement of net income and income tax liability for each of such years is as follows:

Year	Net Income Reported	Tax Liability Reported	Correct Net Income	Correct Tax Liability
1944	\$12,600.13	\$3,806.06	\$23,440.83	\$ 9,623.33
1945	21,449.28	8,331.76	31,245.11	14,566.06
1946	18,656.85	5,968.97	86,606.91	51,302.49

(c) At the time the aforesaid returns for the taxable years 1944, 1945 and 1946 were prepared and filed, the petitioner knew that such returns were false and fraudulent, and that the amount of net income reported therein and the resultant tax liability shown thereon were understated in each of the said returns. The petitioner knowingly, wilfully and fraudulently made and filed her income tax returns for the taxable years 1944, 1945 and 1946 with intent to deceive respondent and evade tax.

(d) During the taxable years in question, petitioner derived and received income from partnership operations conducted under the partnership name of Sherry Enterprises.

(e) Books and records pertaining to the income producing activities of the aforementioned partnership during the years in question were too inadequate and insufficient to enable the Commissioner, through his examining agents, to check and verify the partnership's correct net income and petitioner's share thereof for the taxable years 1944, 1945 and 1946; said records were inadequate in that they were incomplete as to some of the partnership's income producing activities and no records were kept of other partnership income producing ac-

tivities. Consequently, it became necessary for the Commissioner to determine the correct amounts of taxable net income for the years involved from other sources of information. The Commissioner, through his examining and investigating agents, determined the taxable income of the partnership for such years by the "Net Worth and Expenditures Method."

(f) The corrected income of the partnership and the petitioner's share thereof is determined for the taxable years 1944, 1945 and 1946 by reference to the increase in net worth of the partnership during such years, as shown in Exhibit 1 attached to this answer and incorporated herein by reference.

(g) The understatement of petitioner's income and income tax liability for each of the taxable years 1944, 1945 and 1946 was due to fraud with intent to evade tax.

(h) Petitioner having filed false and fraudulent returns with intent to evade tax for the taxable years 1944, 1945 and 1946, neither the assessment nor collection of the proposed deficiencies is barred by any statute of limitations under the provisions of Section 276(a) of the Internal Revenue Code of 1939.

9. Further answering the petition, for an alternative defense, respondent alleges that the five-year period of limitation is applicable under Section 275(c) of the Internal Revenue Code of 1939 for assessment and collection of the deficiency determined by the Commissioner for the taxable year 1945 as set forth in the notice of deficiency. In sup-

port of such determination, respondent alleges as follows:

(a) On March 15, 1946 petitioner filed her return for the year 1945 with the Collector of Internal Revenue for the Sixth District of California.

(b) Petitioner improperly omitted from gross income reported for the year 1945 an amount properly includible therein which is in excess of 25 per centum of the amount of gross income stated in the return.

(c) On December 14, 1950, and within five years after filing petitioner's income tax return for 1945, the petitioner and the Commissioner duly executed a waiver consenting to the assessment and collection of any deficiency which might be determined for the year 1945 predicated upon the Commissioner's proper inclusion in petitioner's gross income of an amount in excess of 25 percent of the gross income stated in her return and the application of the five-year statutory period of limitation as provided under Section 275(c) of the Internal Revenue Code. Successive agreements were later timely executed by petitioner and respondent, further extending the statute of limitations until June 30, 1955 with respect to such taxable year. Respondent's notice of deficiency mailed to petitioner on October 28, 1954 was timely mailed under the provisions of Sections 275(c) and 276(b) of the Internal Revenue Code of 1939.

10. Further answering the petition, respondent alleges as follows:

(a) On March 15, 1947 petitioner filed her return

for the year 1946 with the Collector of Internal Revenue for the Sixth District of California. On March 6, 1950, and before the expiration of the three-year statute of limitations with respect to the year 1946, the petitioner and the Commissioner duly executed a waiver extending the statute of limitations. Successive agreements were later timely executed by petitioner and respondent, further extending the statute of limitations until June 30, 1955 with respect to such taxable year. Respondent's notice of deficiency mailed to petitioner on October 28, 1954 was timely mailed under the provisions of Section 276(b) of the Internal Revenue Code of 1939.

Wherefore, it is prayed:

1. That the relief sought in the petition be denied.

2. That the deficiencies in income taxes for the taxable years 1944, 1945 and 1946, as set forth in the notice of deficiency, be in all respects approved.

3. That the deficiencies in fraud penalties for the taxable years 1944, 1945 and 1946, as set forth in the notice of deficiency, be in all respects approved.

4. That this Court find and hold that the assessment and collection of the proposed deficiencies for the taxable years 1944, 1945 and 1946 are not barred by any statute of limitations under the provisions of section 276(a) of the Internal Revenue Code for 1939.

5. In the alternative, that this Court enter its decision that petitioner improperly omitted from gross income reported for the year 1945 an amount properly includible therein which is in excess of 25 per centum of the amount of gross income stated in such return; that for the year 1945 the five-year period of limitation for assessment and collection of the income tax deficiency for such year attaches pursuant to Section 275(c) of the Internal Revenue Code for 1939; that the Commissioner's notice of deficiency mailed to petitioner on October 28, 1954 was timely under the provisions of sections 275(c) and 276(b) of the Internal Revenue Code of 1939; and that the assessment and collection of the deficiencies for the years 1945 and 1946 is not barred.

/s/ R. P. HERTZOG, ECC.

Acting Chief Counsel, Internal
Revenue Service

Of Counsel: Melvin L. Sears, Regional Counsel, E.
C. Crouter, Assistant Regional Counsel, R. E.
Maiden, Jr., Special Assistant to the Regional
Counsel, Mark Townsend, Attorney, Internal
Revenue Service.

[Note: Attached Exhibit No. 1 is a duplicate
of Computation of Net Worth of Partnership
printed at pages 12-13 of this printed record.]

[Endorsed]: T.C.U.S. Filed March 15, 1955.

[Title of Tax Court and Cause No. 56085.]

REPLY

The above-named petitioner, for reply to the allegations affirmatively set out by the respondent in his Answer, admits and denies as follows:

8. Referring to paragraph 8 of the Answer, petitioner alleges that she was on active duty with the United States Navy from February, 1943, to November, 1945. In March, 1945, when her return for 1944 was due, petitioner was out of the State of California on active duty with the U. S. Navy, and her return for that year was filed by her father, Nathan Sherry, pursuant to a Power of Attorney previously granted to him by petitioner. The return was prepared by accountants employed by Nathan Sherry, and on March 15, 1945, it was filed by Nathan Sherry with the Collector of Internal Revenue for the Sixth District of California. The return was not presented to petitioner for her examination of it prior to the time it was filed.

With respect to petitioner's returns for the years 1945 and 1946, those returns were also prepared by accountants employed by Nathan Sherry. The return for 1945 was filed with said Collector on March 15, 1946, and the return for 1946 was filed with said Collector on March 15, 1947.

Denies the remaining allegations of paragraph 8 of the Answer.

9. Admits that on March 15, 1946, petitioner's return for the year 1945 was filed with said Collector. Admits that on about December 14, 1950, petitioner and the Commissioner executed a waiver ex-

tending the statute of limitations to June 30, 1952, with respect to the year 1945. Admits that successive agreements were executed by petitioner and respondent further extending the statute of limitations to June 30, 1955, with respect to such year. Admits that respondent's notice of deficiency was mailed to petitioner on October 28, 1954. Denies the remaining allegations of paragraph 9 of the Answer.

10. Admits that on March 15, 1947, petitioner's return for the year 1946 was filed with said Collector. Admits that in December, 1950, petitioner and Commissioner executed a waiver extending the statute of limitations to June 30, 1952, with respect to the year 1946. Admits that successive agreements were later executed by petitioner and respondent, further extending the statute of limitations to June 30, 1955, with respect to such year. Admits that respondent's notice of deficiency was mailed to petitioner on October 28, 1954. Denies the remaining allegations of paragraph 10 of the Answer.

Denies generally and specifically each and every allegation contained in the Answer, not hereinbefore specifically admitted, qualified or denied.

Wherefore, it is prayed that the affirmative relief requested by the respondent in his Answer be denied.

/s/ CHARLES H. CARR,
/s/ WILLIAM K. RASMUSSEN,
/s/ NORMAN GOODMAN,
Counsel for Petitioner

[Endorsed]: T.C.U.S. Filed May 2, 1955.

[Title of Tax Court and Cause No. 56086.]

PETITION

The above-named petitioners hereby petition for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency dated October 28, 1954, and as a basis of their proceeding allege as follows:

1. Petitioner Newton Ivan Sherry is an individual with residence at 1063 - 10th Street, Hermosa Beach, California. Petitioner Lois Sherry is an individual with residence at 13408 South Vermont Avenue, Gardena, California. The returns for the years here involved were filed with the Collector at Los Angeles, California.

2. The notice of deficiency (a copy of which is attached and marked Exhibit "A") was mailed to the petitioners on October 28, 1954.

3. The deficiency as determined by the Commissioner is in income taxes as follows:

Year	Deficiency	50% Penalty
1945	\$ 5,123.17	\$ 3,118.79
1946	45,760.54	22,880.27
Total	<hr/> \$50,883.71	<hr/> \$25,999.06

All of the above tax deficiencies and penalties are in controversy.

4. The determination of tax set forth in said notice of deficiency is based upon the following errors:

(a) The Commissioner has erroneously deter-

mined said deficiencies and penalties because the statute of limitations under Section 275 of the Internal Revenue Code of 1939 has run on all of the above years;

(b) The Commissioner has erroneously determined that an alleged partnership called Sherry Enterprises existed and that petitioner Newton Ivan Sherry was a partner therein;

(c) The Commissioner has erroneously determined that the increase in net worth of said alleged partnership was the result of income received by such partnership;

(d) The Commissioner has erroneously used the "net worth" method to determine said deficiencies;

(e) The Commissioner has erroneously determined that petitioners received income from said alleged partnership during said years; and

(f) The Commissioner has erroneously added fraud penalties to said deficiencies. There was no intent to evade payment of income taxes.

5. The facts upon which the petitioners rely as the basis of this proceeding are as follows:

(a) Petitioners' income tax return for 1945 was filed with said Collector on or before March 15, 1946, and their return for 1946 was filed with said Collector on or before March 15, 1947. The statute of limitations (section 275 of the Internal Revenue Code of 1939) has run, therefore, on both of said years.

(b) Petitioner Newton Ivan Sherry was not a partner in any partnership known as Sherry Enterprises because there was, in fact, no such partner-

ship. But even if this Court should determine that such partnership did exist, said petitioner was not a partner therein. Petitioner Newton Ivan Sherry was on active duty with the United States Marines from 1940 to May, 1945, which included duty at Guadalcanal and vicinity from about April, 1943, to December, 1944. And from May, 1945, to July, 1946, he attended California Polytechnic College at San Luis Obispo, California. Said petitioner did not participate in any transactions or businesses involving the alleged Sherry Enterprises during any of the above taxable years. He also did not receive any money or property from the alleged partnership during said years, either as the income of such partnership or otherwise.

(c) If it should be determined that such alleged partnership did exist, petitioners allege that the partnership kept adequate books and records during said years which clearly reflect its income. Hence the Commissioner erroneously reconstructed the income of the alleged partnership by using the "net worth" method.

(d) Further, that in the event this Court determines that such alleged partnership did exist during said years and that petitioner Newton Ivan Sherry was a partner therein, petitioners allege that the increase in net worth of such partnership over and above the income reported by the partnership in its tax returns was the result of capital contributions by Nathan Sherry, the deceased father of petitioner Newton Ivan Sherry, and not as the result of income earned or received by the partner-

ship. During said years Nathan Sherry made the following capital contributions to the alleged partnership:

	Fiscal Years Ending	
	6-30-45	6-30-46
Cash	\$ 4,348.00	\$ 42,000.00
Bonds	5,000.00	40,000.00
Interest in partnerships	4,572.50	62,211.50
Cashier's checks .....	.....	60,000.00
Real Estate	17,500.00	3,000.00
Notes and Accounts Receivable....	.....	5,000.00
Furniture and Fixtures .....	.....	2,120.00
Other .....	.....	30,000.00
	<hr/>	<hr/>
Total.....	\$ 31,420.50	\$244,331.50

Also, the Commissioner has erroneously included as an accounts receivable of the alleged partnership on June 30, 1946, the amount of \$30,000.00 as an accounts receivable due from Edward J. Margett. Edward J. Margett did not owe the alleged partnership the sum of \$30,000.00 or any other amount on June 30, 1946.

Wherefore, petitioners pray that this Court may hear the proceedings and determine that there is no deficiency due from the petitioners for the years 1945 and 1946.

/s/ CHARLES H. CARR,

/s/ WILLIAM K. RASMUSSEN,

Counsel for Petitioners

Duly Verified.

EXHIBIT "A"

1250 Subway Terminal Building, 417 South Hill
Street, Los Angeles 13, California

Ap:LA:AA-PAK

90D

Oct. 28, 1954

Mr. Newton Ivan Sherry and Mrs. Lois Sherry,
Husband and Wife,
1063 10th Street, Hermosa Beach, California

Dear Mr. and Mrs. Sherry:

You are advised that the determination of your income tax liability for the taxable years ended December 31, 1945 and December 31, 1946 discloses deficiencies in tax aggregating \$50,883.71, and penalties aggregating \$25,999.06, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiencies mentioned.

Within 90 days from the date of the mailing of this letter you may file a petition with The Tax Court of the United States, at its principal address, Washington 4, D. C., for a redetermination of the deficiency. In counting the 90 days you may not exclude any day unless the 90th day is a Saturday, Sunday, or legal holiday in the District of Columbia in which event that day is not counted as the 90th day. Otherwise Saturdays, Sundays, and legal holidays are to be counted in computing the 90-day period.

Should you not desire to file a petition, you are requested to execute, in duplicate, the enclosed

Exhibit "A"—(Continued)

form and forward it to the Assistant Regional Commissioner, Appellate, 1250 Subway Terminal Building, 417 South Hill Street, Los Angeles 13, California. The signing and filing of this form will expedite the closing of your returns by permitting an early assessment of the deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after receipt of the form, or on the date of assessment, or on the date of payment, whichever is earliest.

Very truly yours,

T. COLEMAN ANDREWS,

Commissioner of Internal Revenue

/s/ By W. T. TIGNOR,

Associate Chief, Appellate Division

Enclosures: Statement, Form 1276, Agreement Form.

PAKar:vmc

Statement

Ap:LA:AA:PAK
90D

Mr. Newton Ivan Sherry and Mrs. Lois Sherry, Husband and Wife, 1063 - 10th Street, Hermosa Beach, California.

Tax Liability for the Taxable Years Ended December 31, 1945
and December 31, 1946

Year	Deficiency	50% Penalty
1945 Income Tax.....	\$ 5,123.17	\$ 3,118.79
1946 Income Tax.....	45,760.54	22,880.27
	<hr/>	<hr/>
Total.....	\$50,883.71	\$25,999.06

In making this determination of your income tax and penalty liability careful consideration has been given to the report of ex-

Exhibit "A"—(Continued)

amination dated November 24, 1952, to your protest dated February 25, 1953, and to the statements made at hearings held on January 27, 1954 and July 16, 1954.

The 50 percent penalty has been asserted for each of the taxable years 1945 and 1946 under the provisions of section 293(d) of the Internal Revenue Code of 1939.

The deficiency for 1945 is assessable under the provisions of sections 275(c) and 276 of the Internal Revenue Code of 1939.

It has been determined that your share of the distributable income from Sherry Enterprises partnership is \$29,889.98 for 1945 and \$82,742.97 for 1946. Inasmuch as you reported \$21,841.88 in 1945 and \$14,792.91 in 1946, your taxable income has been increased by the differences of \$8,048.10 and \$67,950.06, respectively, computed as follows:

COMPUTATION OF NET WORTH OF PARTNERSHIP

Assets:	Jun. 30, 1944	Jun. 30, 1945	Jun. 30, 1946
Cash.....	\$ 10,322.24	(\$ 363.71)	\$ 28,176.59
Stocks.....	-----	-----	-----
Bonds.....	50,000.00	50,000.00	50,000.00
Interest in partnerships....	90,712.18	133,424.34	348,326.34
Cashier's checks.....	-----	2,000.00	60,000.00
Real estate.....	-----	118,020.42	94,619.50
Notes and accounts receivable.....	50,000.00	30,000.00	42,400.00
Furniture and Fixtures....	-----	-----	6,743.55
Total Assets.....	\$201,034.42	\$333,081.05	\$630,265.98
Liabilities:			
Accounts payable	\$ 403.34	\$ -----	\$ 15,000.00
Notes payable.....	45,000.00	40,000.00	-----
Trust deed payable.....	-----	21,400.00	17,500.00
Total Liabilities.....	\$ 45,403.34	\$ 61,400.00	\$ 32,500.00
Net Worth.....	\$155,631.08	\$271,681.05	\$597,765.98
		1945	1946
Net worth at end of year.....		\$271,681.05	\$597,765.98
Net worth at beginning of year.....		155,631.08	271,681.05
Increase in net worth.....		\$116,049.97	\$326,084.93

Exhibit "A"—(Continued)

	1945	1946
Additions:		
Personal expenses.....	6,883.00	12,127.62
Federal income tax payments.....	23,324.89	22,397.86
State income tax payments.....	573.70	.....
Payment to stock brokers.....	900.00	1,915.00
Purchase of personal items.....	.....	6,911.01
Total.....	\$147,731.56	\$369,436.42
Reductions:		
Proceeds of sale of stock.....	2,498.50	.....
Capital contributions.....	12,040.00	5,000.00
Check from brokers.....	10,614.31	.....
Balance.....	\$122,578.75	\$364,436.42
Add: Income adjustments:		
Ordinary income of partnership.....	.....	1,170.00
Short-term capital gain.....	(5,000.00)	(277.00)
Long-term capital gain—taxable portion.....	(3,989.17)	(17,178.78)
Long-term capital gain—non- taxable portion.....	(3,989.17)	(17,178.78)
Ordinary net income corrected.....	\$109,600.41	\$330,971.86
Ordinary net income per return.....	77,407.99	59,171.64
Understatement of net income.....	\$ 32,192.42	\$271,800.22
Your distributive share of amount of understatement.....	\$ 8,048.10	\$ 67,950.06

A copy of the letter and a copy of this statement have been mailed to your representative, 417 South Hill Street, Los Angeles 13, California, in accordance with the authority contained in the power of attorney executed by you.

ADJUSTMENTS TO NET INCOME

Taxable Year Ended December 31, 1945

Net income as disclosed by return.....	\$ 22,085.98
Additional income:	
(a) Income from partnerships	10,537.97
Total	\$ 32,623.95

Exhibit "A"—(Continued)

Reduction:

(b) Long-term capital gain 742.15

Net income adjusted\$ 31,881.80

EXPLANATION OF ADJUSTMENTS

(a) Income from partnerships is increased by \$10,537.97 consisting of the following:

(1) Income from Sherry Enterprises.....\$ 8,048.10

(2) Income from other partnerships..... 2,489.87

Total.....\$10,537.97

(1) This adjustment is previously explained herein.

(2) This adjustment was previously made to net income and agreed to by you.

(b) This adjustment was previously made to net income and agreed to by you.

COMPUTATION OF ALTERNATIVE TAX

Taxable Year Ended December 31, 1945

Net income adjusted\$ 31,881.80

Less: Excess of net long-term capital gain over net
short-term capital loss 255.14

Ordinary income\$ 31,626.66

Less: Surtax exemptions 1,000.00

Surtax net income\$ 30,626.66

Ordinary net income\$ 31,626.66

Less: Normal-tax exemptions..... 1,000.00

Balance subject to normal tax.....\$ 30,626.66

Normal tax at 3% of \$30,626.66.....\$ 918.80

Surtax on \$30,626.66 13,608.53

Partial tax\$ 14,527.33

Plus: 50% of \$255.14 127.57

Alternative tax\$ 14,654.90

Exhibit "A"—(Continued)

COMPUTATION OF TAX

Taxable Year Ended December 31, 1945

Net income adjusted	\$ 31,881.80
Less: Surtax exemptions	1,000.00

Balance subject to surtax.....	\$ 30,881.80
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Net income adjusted	\$ 31,881.80
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Less: Normal tax exemptions	1,000.00
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Net income subject to normal tax	\$30,881.80
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Normal tax at 3% of \$30,881.80.....	926.45
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Surtax on \$30,881.80	13,766.72
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Total normal tax and surtax.....	\$ 14,693.17
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Alternative tax	\$ 14,654.90
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Correct income tax liability.....	\$ 14,654.90
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Income tax liability shown on return,

account No. 3040691	\$ 8,417.31
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Additional, Oct. 1, 1948,

No. 10-510048	1,114.42	9,531.73
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Deficiency of income tax.....	\$ 5,123.17
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50% penalty:

Correct income tax liability.....	\$ 14,654.90
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Liability shown by return	8,417.31
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Excess	\$ 6,237.59
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50% penalty (50% of \$6,237.59)	\$ 3,118.79
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ADJUSTMENT TO NET INCOME

Taxable Year Ended December 31, 1946

Net income as disclosed by return.....	\$ 20,606.85
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Additional income:

(a) Income from partnership	67,950.06
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Net income adjusted	\$ 88,556.91
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EXPLANATION OF ADJUSTMENT

(a) This adjustment is previously explained herein.

Exhibit "A"—(Continued)

COMPUTATION OF ALTERNATIVE TAX

Taxable Year Ended December 31, 1946

Net income adjusted	\$ 88,556.91
Less: Excess of net long-term capital gain over net short-term capital loss	4,294.70
Ordinary net income	\$ 84,262.21
Less: Exemptions	1,000.00
Balance, subject to surtax and normal tax.....	\$ 83,262.21
Tentative surtax	\$ 50,462.39
Tentative normal tax at 3%.....	2,497.86
Total tentative tax	\$ 52,960.25
Less 5%	2,648.01
Partial tax	\$ 50,312.24
Plus: 50 percent of \$4,294.70.....	2,147.35
Alternative tax	\$ 52,459.59

COMPUTATION OF TAX

Taxable Year Ended December 31, 1946

Net income adjusted	\$ 88,556.91
Less: Exemptions	1,000.00
Balance, subject to surtax and normal tax.....	\$ 87,556.91
Tentative surtax	\$ 53,941.09
Tentative normal tax at 3%.....	2,626.71
Total tentative tax	\$ 56,567.80
Less 5%	2,828.39
Total normal tax and surtax	\$ 53,739.41
Alternative tax	\$ 52,459.59
Correct income tax liability	\$ 52,459.59
Income tax liability shown on return, account No. 3036201	6,699.05
Deficiency of income tax	\$ 45,760.54
50% penalty	\$ 22,880.27

[Endorsed]: T.C.U.S. Filed January 24, 1955.

[Title of Tax Court and Cause No. 56086.]

ANSWER

The Commissioner of Internal Revenue, by his attorney, R. P. Hertzog, Acting Chief Counsel, Internal Revenue Service, for answer to the petition of the above-named taxpayers, admits, denies and alleges as follows:

1. Denies that petitioner Lois Sherry resides at 13408 South Vermont Avenue, Gardena, California; admits the remaining allegations contained in paragraph 1 of the petition.

2, 3. Admits the allegations contained in paragraphs 2 and 3 of the petition.

4. Denies the allegations of error contained in paragraph 4 of the petition, and all subparagraphs thereof.

5 (a) Admits that petitioners' income tax return for 1945 was filed with said Collector on March 15, 1946, and their return for 1946 was filed with said Collector on March 15, 1947; denies the remaining allegations contained in subparagraph (a) of paragraph 5 of the petition.

(b), (c), (d) Denies the allegations contained in subparagraphs (b), (c) and (d) of paragraph 5 of the petition.

6. Denies generally and specifically each and every allegation contained in the petition, not hereinbefore specifically admitted, qualified or denied.

Further answering the petition, the respondent alleges that:

7. The petitioners are liable for the fifty percent fraud penalties proposed under Section 293(b) of the Internal Revenue Code of 1939 for the taxable years 1945 and 1946, in the respective amounts of \$3,118.79 and \$22,880.27 as determined by the Commissioner and set forth in his notice of deficiency. In support of the Commissioner's determination of such fraud penalties, the respondent alleges and relies upon the following facts:

(a) That petitioners caused to be prepared and filed with the Collector of Internal Revenue for the Sixth District of California joint income tax returns for the taxable years 1945 and 1946 and represented that each such return was a true and correct return.

(b) In truth and in fact, each of the said returns filed by the petitioners for the taxable years 1945 and 1946 was false and fraudulent in that they understated the true and correct amounts of net income and resultant tax liability thereon for each of such taxable years. The extent of the false and fraudulent understatement of net income and income tax liability for each of such years is as follows:

Year	Net Income Reported	Tax Liability Reported	Correct Net Income	Correct Tax Liability
1945	\$22,085.98	\$8,417.31	\$31,881.80	\$14,654.90
1946	20,606.85	6,699.05	88,556.91	52,459.59

(c) At the time the aforesaid returns for the tax-

able years 1945 and 1946 were prepared and filed, the petitioners knew that such returns were false and fraudulent, and that the amount of net income reported therein and the resultant tax liability shown thereon were understated in each of the said returns. The petitioners knowingly, wilfully and fraudulently made and filed their income tax returns for the taxable years 1945 and 1946 with intent to deceive respondent and evade tax.

(d) During the taxable years in question, petitioners derived and received income from partnership operations conducted under the partnership name of Sherry Enterprises.

(e) Books and records pertaining to the income producing activities of the aforementioned partnership during the years in question were too inadequate and insufficient to enable the Commissioner, through his examining agents, to check and verify the partnership's correct net income and petitioners' share thereof for the taxable years 1945 and 1946; said records were inadequate in that they were incomplete as to some of the partnership's income producing activities and no records were kept of other partnership income producing activities. Consequently, it became necessary for the Commissioner to determine the correct amounts of taxable net income for the years involved from other sources of information. The Commissioner, through his examining and investigating agents determined the taxable income of the partnership for such years by the "Net Worth and Expenditure Method."

(f) The corrected income of the partnership and the petitioners' share thereof is determined for the taxable years 1945 and 1946 by reference to the increase in net worth of the partnership during such years, as shown in Exhibit 1 attached to this answer and incorporated herein by reference.

(g) The understatement of petitioners' income and income tax liability for each of the taxable years 1945 and 1946 was due to fraud with intent to evade tax.

(h) Petitioners having filed a false and fraudulent return with intent to evade tax for the taxable year 1945 neither the assessment nor collection of the proposed deficiency is barred by any statute of limitations under the provisions of Section 276(a) of the Internal Revenue Code of 1939.

8. Further answering the petition, for an alternative defense, respondent alleges that the five-year period of limitation is applicable under Section 275(c) of the Internal Revenue Code of 1939 for assessment and collection of the deficiency determined by the Commissioner for the taxable year 1945 as set forth in the notice of deficiency. In support of such determination, respondent alleges as follows:

(a) On March 15, 1946 petitioners filed their return for the year 1945 with the Collector of Internal Revenue for the Sixth District of California.

(b) Petitioners improperly omitted from gross income reported for the year 1945 an amount properly includible therein which is in excess of 25

per centum of the amount of gross income stated in the return.

(c) On December 14, 1950, and within five years after filing petitioners' income tax return for 1945, the petitioners and the Commissioner duly executed a waiver consenting to the assessment and collection of any deficiency which might be determined for the year 1945 predicated upon the Commissioner's proper inclusion in petitioners' gross income of an amount in excess of 25 percent of the gross income stated in their return and the application of the five-year statutory period of limitation as provided under Section 275(c) of the Internal Revenue Code. Successive agreements were later timely executed by petitioners and respondent, further extending the statute of limitations until June 30, 1955 with respect to such taxable year. Respondent's notice of deficiency mailed to petitioners on October 28, 1954 was timely mailed under the provisions of Section 275(c) and 276(b) of the Internal Revenue Code of 1939.

9. Further answering the petition, respondent alleges as follows:

(a) On March 15, 1947 petitioners filed their return for the year 1946 with the Collector of Internal Revenue for the Sixth District of California. On March 6, 1950, and before the expiration of the three-year statute of limitations with respect to the year 1946, the petitioners and the Commissioner duly executed a waiver extending the statute of limitations. Successive agreements were later timely

executed by petitioners and respondent, further extending the statute of limitations until June 30, 1955 with respect to such taxable year. Respondent's notice of deficiency mailed to petitioners on October 28, 1954 was timely mailed under the provisions of Section 276(b) of the Internal Revenue Code of 1939.

Wherefore, it is prayed:

1. That the relief sought in the petition be denied.

2. That the deficiencies in income taxes for the taxable years 1945 and 1946, as set forth in the notice of deficiency, be in all respects approved.

3. That the deficiencies in fraud penalties for the taxable years 1945 and 1946, as set forth in the notice of deficiency, be in all respects approved.

4. That this Court find and hold that the assessment and collection of the proposed deficiency for the taxable year 1945 is not barred by any statute of limitations under the provisions of Section 276(a) of the Internal Revenue Code for 1939.

5. In the alternative, that this Court enter its decision that petitioners improperly omitted from gross income reported for the year 1945 an amount properly includible therein which is in excess of 25 per centum of the amount of gross income stated in such return; that for the year 1945 the five-year period of limitation for assessment and collection of the income tax deficiency for such year attaches

pursuant to Section 275(c) of the Internal Revenue Code of 1939; that the Commissioner's notice of deficiency mailed to petitioners on October 28, 1954 was timely under the provisions of Sections 275(c) and 276(b) of the Internal Revenue Code of 1939; and that the assessment and collection of the deficiencies for the years 1945 and 1946 is not barred.

/s/ R. P. HERTZOG, ECC.

Acting Chief Counsel, Internal
Revenue Service.

Of Counsel: Melvin L. Sears, Regional Counsel, E. C. Crouter, Assistant Regional Counsel, R. E. Maiden, Jr., Special Assistant to the Regional Counsel, Mark Townsend, Attorney, Internal Revenue Service.

[Note: Exhibit 1 attached is a duplicate of Computation of Net Worth of Partnership printed in full at pages 32-33 of this printed record.]

[Endorsed]: T.C.U.S. Filed March 15, 1955.

[Title of Tax Court and Cause No. 56086.]

REPLY

The above-named petitioners, for reply to the allegations affirmatively set out by the respondent in his Answer, admit and deny as follows:

7. Referring to paragraph 7 of the Answer, petitioners allege that for the years 1945 and 1946 their joint returns were filed with the Collector of

Internal Revenue for the Sixth District of California. Deny the remaining allegations of paragraph 7 of the Answer.

8. Referring to paragraph 8 of the Answer, petitioners allege that on March 15, 1946, their return for the year 1945 was filed with said Collector. Admit that in December, 1950, petitioners and the Commissioner executed a waiver extending the statute of limitations to June 30, 1952, with respect to the year 1945. Admit that successive agreements were executed by petitioners and respondent further extending the statute of limitations to June 30, 1955, with respect to such year. Admit that respondent's notice of deficiency was mailed to petitioners on October 28, 1954. Deny the remaining allegations of paragraph 8 of the Answer.

9. Referring to paragraph 9 of the Answer, petitioners allege that on March 15, 1947, their return for the year 1946 was filed with said Collector. Admit that in December, 1950, petitioners and Commissioner executed a waiver extending the statute of limitations to June 30, 1952, with respect to the year 1946. Admit that successive agreements were later executed by petitioners and respondent further extending the statute of limitations to June 30, 1955, with respect to such year. Admit that respondent's notice of deficiency was mailed to petitioners on October 28, 1954. Deny the remaining allegations of paragraph 9 of the Answer.

Deny generally and specifically each and every

allegation contained in the Answer, not hereinbefore specifically admitted, qualified or denied.

Wherefore, it is prayed that the affirmative relief requested by the respondent in his Answer be denied.

/s/ CHARLES H. CARR,
/s/ WILLIAM K. RASMUSSEN,
/s/ NORMAN GOODMAN,
Counsel for Petitioner

[Endorsed]: T.C.U.S. Filed May 2, 1955.

[Title of Tax Court and Cause Nos. 56085-56086.]

MINUTES OF PROCEEDINGS

Date: April 15, 1957. Place: Los Angeles, Calif.
Docket Nos. 56085, 56086.

Proceeding: Margaret Lillian Ferguson, et al.

Judge: Arnold Raum, Division No. 11.

Counsel: For Petitioner, Charles H. Carr, Esq.,
403 Subway Terminal Bldg., 417 S. Hill St., Los
Angeles 13. For Respondent, Mark Townsend, Esq.

Stenographic Reporter: Miriam Polk. Transcript
ordered: Yes.

Hearing of trial commenced at 11:10 a.m. Closed
at 4:40 p.m. On the merits: Yes.

On motion: Joint oral motion to consolidate cases
for trial—Granted.

Action: Submitted.

Filed at hearing: Stipulation of facts.

Petitioner's brief: May 31, 1957.

Respondent's brief: July 1, 1957.

Pet. reply: July 22, 1957.

Witnesses: For Petitioner, Herndon Hughes, Newton Sherry, Margaret Ferguson, Paul Kalmanovitz, James F. Murray. For Respondent, William B. Burns.

Exhibits: Petitioner's: None. Respondent's: Resp. exhibits A thru J—attached to stipulation of facts and described therein. K—Waiver and Rev. Agent's Report. L—Waiver and Rev. Agent's Report. M—Sworn statement of Margaret Ferguson.

/s/ GEORGE J. BAIRD,
Deputy Clerk

The Tax Court of the United States

Docket No. 56085

Margaret Lillian Ferguson, Petitioner, vs. Commissioner of Internal Revenue, Respondent.

Docket No. 56086

Newton Ivan Sherry, Lois Sherry, Petitioners, vs. Commissioner of Internal Revenue, Respondent.

Docket No. 56087

Newton Ivan Sherry, Petitioner, vs. Commissioner of Internal Revenue, Respondent.

STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the parties hereto by their respective counsel of record that the following facts shall be taken as

true without prejudice to the right of either party to submit material and competent evidence of any other facts not inconsistent herewith:

1. Newton Ivan Sherry and Margaret Lillian Ferguson (nee Sherry) are the son and daughter of Nathan Sherry, deceased. Lucille Lawler Sherry is their stepmother. Lois Sherry is the wife of Newton Ivan Sherry.

2. The only issue with respect to income is whether or not these petitioners are taxable on a distributable share of the income of Sherry Enterprises, since petitioners Margaret Lillian Ferguson and Newton Ivan Sherry contend that they were not partners in Sherry Enterprises. Petitioners do not contest respondent's determination that the net worth statements set forth in the notices of deficiency reflect the income of Sherry Enterprises for the fiscal years 1945 and 1946, because they state they have no knowledge or information regarding the same.

3. The respondent concedes that the deficiencies determined herein against the petitioners are not due to fraud with intent to evade tax and that the provisions of section 293(b) IRC of 1939 are not applicable.

4. The statute of limitations has expired for the year 1944 as to the petitioners. Due to waivers duly signed by petitioners and the respondent after the expiration of the three-year statute of limitations, the year 1945 is open only in the event the provisions of section 275(c) IRC of 1939 are held ap-

plicable thereto. Due to waivers duly signed by petitioners and the respondent the three-year statute of limitations has not expired with respect to the year 1946.

5. Attached hereto and marked respondent's exhibits A and B are true copies of petitioner Margaret Lillian Ferguson's returns filed for the years 1945 and 1946, respectively, which returns bear the signatures of petitioner Margaret Lillian Ferguson.

6. Attached hereto and marked respondent's exhibits C and D are true copies of the joint returns of petitioners Newton Ivan Sherry and Lois Sherry filed for the years 1945 and 1946, respectively, which returns bear the signatures of said petitioners.

7. Attached hereto and marked respondent's exhibits E and F are true copies of Forms 1065 of the Sherry Enterprises filed for the years ending June 30, 1945 and June 30, 1946, respectively.

8. Attached hereto and marked respondent's exhibits G and H are true copies of Articles of Co-Partnership and amendment thereto, respectively, signed by petitioners Newton Ivan Sherry and Margaret Lillian Ferguson (nee Sherry), their father, Nathan Sherry, and their stepmother, Lucille Lawler Sherry. Said Articles of Co-Partnership and amendment thereto were prepared by Ned Williams, an attorney at law, who is now deceased.

9. Attached hereto and marked respondent's exhibits I and J are gift tax returns of Nathan

Sherry and Lucille Lawler Sherry, respectively, for the year 1943, which exhibits include donee information returns of Newton Ivan Sherry and Margaret Lillian Ferguson (nee Sherry).

/s/ WM. K. RASMUSSEN,

Counsel for Petitioners

/s/ NELSON P. ROSE, REM.

Chief Counsel, Internal Revenue
Service, Counsel for Respondent

[Endorsed]: T.C.U.S. Filed April 15, 1957.

T. C. Memo. 1958-32

Tax Court of the United States

Margaret Lillian Ferguson, Petitioner, vs. Commissioner of Internal Revenue, Respondent.

Newton Ivan Sherry, Lois Sherry, Petitioners, vs. Commissioner of Internal Revenue, Respondent.

Docket Nos. 56085, 56086

Filed February 26, 1958

Charles H. Carr, Esq., for the petitioners.

Mark Townsend, Esq., for the respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

Respondent determined the following deficiencies:

Margaret Lillian Ferguson, Docket No. 56085:

Year 1944—Income Tax, \$5,817.27. Additions for Fraud, \$2,908.63.

Year 1945—Income Tax, \$5,124.55. Additions for Fraud, \$3,117.15.

Year 1946—Income Tax, \$45,333.52. Additions for Fraud, \$22,666.76.

Newton Ivan Sherry and Lois Sherry, Docket No. 56086:

Year 1945—Income Tax \$5,123.17. Additions for Fraud, \$3,118.79.

Year 1946—Income Tax, \$45,760.54. Additions for Fraud, \$22,880.27.

It was stipulated that no fraud is applicable to any of the years involved herein, and that the statute of limitations has expired for the year 1944.

At issue is whether Newton Ivan Sherry and Margaret Lillian Ferguson were members of a partnership during the years 1945 and 1946.

Findings of Fact

Some of the facts were stipulated and are hereby incorporated as part of these findings.

Petitioners Newton Ivan Sherry (hereinafter referred to as "Newton") and Margaret Lillian Ferguson (hereinafter referred to as "Margaret") are the children of Nathan Sherry (hereinafter referred to as "Nathan"). Nathan's first wife, the mother of Newton and Margaret, died in 1937. In 1938 Nathan married Lucille Lawler Sherry (hereinafter referred to as "Lucille"). Nathan died in 1954. Petitioner Lois Sherry is the wife of Newton, and, aside from the fact that she filed joint returns with Newton, has no connection with the issue here involved.

Petitioners' returns for the calendar years 1945 and 1946 were filed with the collector of internal revenue for the sixth district of California.

Nathan, after discussions with his lawyer and his accountants, had his lawyer draft a partnership agreement dated October 1, 1943, which stated in part:

Whereas, First Parties [Nathan and Lucille] were married on the first day of April, 1938 and ever since said date have been and now are husband and wife; and

Whereas, since said marriage First Parties have acquired and now own and hold the hereinafter described properties as community property; and

Whereas, First Parties acquired all of said properties by and through their joint and several personal services actually rendered since the date of said marriage; and

That said properties are described as follows:

50% interest of S & P Company valued at \$30,000.00;

25% interest of Hollywood Recreation Company valued at \$25,000.00;

100% interest of Hollyway Cafe valued at \$5,000.00;

50% interest of Monticello Cafe valued at \$4,500.00;

33 $\frac{1}{3}$ % interest of Pago Cafe valued at \$3,000.00;

12 $\frac{1}{2}$ % interest of Swing Club valued at \$1,500.00; and

Whereas, Second Parties are the children of Nathan Sherry by a former marriage, and there

are no children the issue of said marriage of First Parties, and

Whereas, First Parties desire to give and transfer to Second Parties one-half of their interest in the afore-described properties for the purpose of creating a partnership between and including all and every of parties hereto,

Now, Therefore, Be It Known by These Presents:

That the parties hereto will become and remain partners for a term of one year if each and all of them shall so long live, and for and during such additional time as each and all shall so desire;

* * * * *

The S & P Company (hereinafter referred to as "S & P") owned and operated bars and restaurants. Paul Kalmanovitz owned the remaining 50 per cent interest in S & P.

The partnership agreement, along with a letter requesting their signatures, was mailed to Newton, who was then on Guadalcanal as a member of the United States Marines, and to Margaret who was then stationed in Ohio as a member of the United States Navy. They, in turn, signed the agreement and mailed it back to their father who was in Los Angeles. At the time they signed the agreement Newton was 23 and Margaret was 20.

Nathan and Lucille filed gift tax returns dated March 15, 1944, for the year 1943 on which they each reported gifts of one-half the property transferred to the new firm. Margaret signed donee returns dated March 15, 1944, in connection there-

with. Nathan signed donee returns as attorney in fact for Newton.

The parties to the original agreement signed an amendment thereto dated July 1, 1944. This amendment stated that the firm's losses were to be borne in equal shares by the parties to the agreement. The amendment indicates that the firm was named Sherry Enterprises (hereinafter referred to as "Enterprises").

Newton was on active duty with the Marines from January 1940 until May 1945. He returned to the United States in March 1945, and was in a hospital in Philadelphia, Pennsylvania, from then until May 1945. Margaret was on active duty with the Navy from February 1943 until November 1945.

Throughout the period relevant to this proceeding Nathan possessed a power of attorney to act in behalf of Newton and Margaret.

Partnership returns for Enterprises for fiscal years beginning July 1, 1944, and ending June 30, 1945, and beginning July 1, 1945, and ending June 30, 1946, dated September 13, 1945, and September 3, 1946, respectively, were signed by Nathan. Petitioners did not examine, sign or have anything to do with the preparation of these returns. Their preparation and filing were carried out under Nathan's direction.

At Nathan's direction accountants prepared the individual returns of Newton and Margaret for the calendar years 1945 and 1946. These returns disclosed that Newton and Margaret each had \$21,-

599.28 of income from Enterprises in 1945 and \$19,156.85 in 1946. Petitioners signed their respective 1945 returns on March 13, 1946. The returns for 1946, signed by petitioners, were received in the office of the collector of internal revenue on March 15, 1947. Nathan saw to the preparation and filing of these returns and also arranged for the payment of the tax shown to be owing on the returns.

Newton enrolled in college for the fall semester of 1945, but dropped out before completion of the semester in order to work for S & P. This was done in response to directions from Nathan. Newton was employed by S & P as manager of a drive-in and bar known as the Bayview Club. His salary was \$110 per week. This job ended sometime in 1946. At no time during this employment did Newton have anything to do with the keeping of the books and records of the Bayview Club.

In 1946 Newton purchased a home for \$8,599. The money for this purchase was given to him by his father. The house was sold later in that same year and the money was returned to Nathan. Newton always considered that the house belonged to Enterprises.

Margaret attended college during the spring semester of 1946. In the fall of that year she worked as an office girl in a perfume business named Sherry Dunn. Margaret believed that this business was owned by Enterprises.

At Nathan's request Margaret sometimes made deposits and withdrawals for him at various banks.

At some of these banks the accounts were in the joint names of Margaret and Nathan. During the period in which Margaret lived in her father's home she drew on these accounts to meet their household expenses. Margaret was married in March 1947 and ceased to live in her father's home.

At the time of their mother's death and in the years following, Newton and Margaret were under the impression that their mother had left them \$20,000 in the care of their father. It was their belief that Nathan used this money in his business, and that it was part of the capital of Enterprises.

Sometime after their discharge from the Armed Forces Newton and Margaret each received approximately \$500 as a result of the death of a grandparent. They turned this money over to Nathan to be used in Enterprises.

In 1945 real property valued at approximately \$52,500 was placed in Margaret's name. In 1946 real property valued at approximately \$2,500 was also placed in her name. All of this property was placed in her name at Nathan's direction. Margaret did not consider herself the owner of this property. She thought it belonged to Enterprises.

In 1947 Nathan transferred stock in the Marguery Corporation, which operates Lucy's restaurant, to Margaret. Nathan had purchased this business with funds from Enterprises. Margaret, at the time of the transfer from her father, considered herself the owner of the transferred shares. For a time Margaret was president of the corporation;

at the time of the trial she managed the restaurant and owned 20 per cent of the corporation's outstanding stock.

Margaret is the record owner of a "fourplex" apartment house valued at approximately \$14,000. Her rights in this property were transferred to her by her father. It was subject to an existing attorney's lien, and there is now an outstanding "assignment" of her rights in this property.

Margaret is the owner of a "triplex" apartment house valued at approximately \$35,000. This house belonged to Enterprises prior to its transfer to Margaret in 1950. Since the transfer of the "triplex" Margaret has made all the mortgage payments thereon.

Newton and his wife signed a "Waiver of Restrictions on the Assessment and Collection of Deficiency in Tax" (Form 870) dated July 19, 1948 for the year 1945 for the amount of \$1,114.42. The address under their signatures is 5444 Melrose Avenue, Los Angeles. Lucy's restaurant is located at that address. In a letter dated September 9, 1948, mailed to the Melrose Avenue address, respondent indicated that the deficiency was caused by an increase in Newton's distributive share of Enterprises' income.

On November 2, 1949, in the course of the Internal Revenue Service's investigation of Nathan's income, Newton testified under oath that he was then a partner in Enterprises.

Margaret signed a "Waiver of Restrictions on

Assessment and Collection of Deficiency in Tax'' dated July 1948 for the year 1945 for the amount of \$1,109.75. The address under Margaret's signature was 5444 Melrose Avenue, Los Angeles. In a letter dated September 9, 1948, mailed to the Melrose Avenue address, respondent indicated that the deficiency was caused by an increase in Margaret's distributive share of Enterprises' income.

On May 15, 1950, in the course of the Internal Revenue Service's investigation of Nathan's income, Margaret testified under oath that she was then a partner in Enterprises.

In 1947 S & P was dissolved. Neither Newton nor Margaret had any connection with the negotiations leading to a division of that company's property.

One of the former S & P properties not taken by Paul Kalmanovitz upon dissolution of that company was the Clover Club and its underlying real property. This property was placed in a trust the beneficiaries of which were Newton and Margaret. The trustee of this trust was an accountant employed by Nathan. The Clover Club was later destroyed by fire. Subsequently this property was sold. Nathan received the proceeds of the sale. The trustee did nothing to protect the interests of the beneficiaries. Nathan was in control of Enterprises; however, at various times he, his wife, Newton and Margaret held informal meetings at which Enterprises' business was discussed.

The earliest that Paul Kalmanovitz heard of the existence of Enterprises was 1947.

Newton and Margaret never asked to examine, or examined any of the books or records of Enterprises or of S & P. Nor did they ever request an accounting in connection with either of these firms.

Respondent increased the income of Sherry Enterprises for the years relevant to petitioners' taxable years 1945 and 1946, and accordingly increased their distributive shares and their income taxes for those years.

Petitioners Newton and Margaret were partners in Sherry Enterprises during the years in question.

Opinion

Raum, Judge: This case presents the reverse of the usual family partnership controversy. Here, petitioners seek to disavow the existence of the partnership. The burden of proof is upon them, and we cannot find on this record that it has been carried.

The picture is far from clear on the evidence before us. It does appear that petitioners'¹ father had a number of business interests involving restaurants, bars, and taverns. These enterprises were operated by various organizations, the principal one being the S & P Company, a partnership in which the father had a 50 per cent interest. In October 1943 a document entitled "Articles of Co-Partnership" was executed by petitioners, their father and stepmother. It identified various business interests, recited that they were held as community property

¹ For convenience, the word "petitioners" is used to refer to Margaret and Newton.

by the father and stepmother who wished to give one-half of their interest to petitioners for the purpose of creating a partnership between all of the parties, and undertook to establish an equal partnership among them. A further agreement, dated July 1, 1944, amended the foregoing in certain particulars; it referred to the partnership as "Sherry Enterprises", and was signed by all four parties. Sherry Enterprises was not an operating company; it merely owned the interests in the various enterprises previously held by petitioners' father.

Petitioners emphasize the fact that neither of them rendered significant services to Sherry Enterprises, but this is not surprising since it was in the nature of a holding company. Moreover, each signed the original partnership agreement as well as the amendment thereto. Gift tax returns were filed. Each petitioner filed income tax returns reporting a share of distributable income of Sherry Enterprises. Each was questioned under oath by Government agents (Newton in 1949 and Margaret in 1950) during the course of an investigation of their father's affairs, and each swore that he or she was a partner. Also, in 1948, Newton signed a document authorizing the assessment and collection of \$1,114.42 additional income taxes for 1945 based upon his distributive share of revised earnings of Sherry Enterprises, and Margaret signed a similar document authorizing the assessment and collection of \$1,109.75 additional income taxes for 1945 based upon her distributive share of those revised earn-

ings. We have reexamined petitioners' testimony in the light of the entire record and are not convinced that they have satisfactorily explained away the obvious conclusions to be drawn from these facts. Additionally, notwithstanding some broad denials, we are far from satisfied that neither in fact received substantial distributions from Sherry Enterprises, directly or indirectly. We cannot conclude on the record before us that petitioners were not in fact bona fide partners in Sherry Enterprises during the years in question.

It is doubtful whether, apart from the gifts, either of them contributed substantial amounts of capital to the partnership. To be sure, each at a later time did contribute \$500 which had been inherited from a grandparent, and there is some suggestion that an amount of approximately \$20,000, said to have been inherited from their mother, found its way into the partnership, but the evidence on this was too unsatisfactory for us to make any finding that such was in fact the case, although they believed that \$20,000 had been left to them by their mother and invested in Sherry Enterprises. Perhaps, if the burden of proof were on the Government, we would hold in favor of petitioners. But the burden is not upon the Government; it is upon petitioners, and we cannot find from the evidence presented that they were not in fact partners in Sherry Enterprises during the tax years. Accordingly, we have found as a fact that they were partners during the years in controversy. Cf. *Maletis vs. United States*, 200 F. 2d 97 (C.A. 9), affirming 97 F. Supp. 562

(D. Ore.); *Love vs. United States*, 96 F. Supp. 919, 921 (C. Cls.); *Higgins vs. Smith*, 308 U.S. 473, 477.

Decisions will be entered under Rule 50.

Tax Court of the United States
Washington

Docket No. 56085

MARGARET LILLIAN FERGUSON,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the memorandum findings of fact and opinion filed herein February 26, 1958, directing that decision be entered under Rule 50, the parties, on May 14, 1958, filed an agreed computation for entry of decision. It is therefore

Ordered and Decided: That there are deficiencies in income tax and additions to tax as follows:

Year 1944—Income Tax, None; Additions to Tax Sec. 293(b), I.R.C. 1939: None.

Year 1945—Income Tax: \$5,124.55; Additions to Tax Sec. 293(b), I.R.C. 1939: None.

Year 1946—Income Tax: \$45,333.52; Additions to Tax Sec. 293(b), I.R.C. 1939: None.

[Seal] /s/ ARNOLD RAUM,
Judge

Entered May 19, 1958. Served May 21, 1958.

Tax Court of the United States
Washington

Docket No. 56086

NEWTON IVAN SHERRY, LOIS SHERRY,
Petitioners,
vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the memorandum findings of fact and opinion filed herein February 26, 1958, directing that decision be entered under Rule 50, the parties, on May 14, 1958, filed an agreed computation for entry of decision. It is therefore

Ordered and Decided: That there are deficiencies in income tax in the amounts of \$5,123.17 and \$45,-760.54 for the taxable years 1945 and 1946, respectively, and that there are no additions to tax under section 293 (b), I.R.C. 1939, for the years 1945 and 1946.

[Seal] /s/ ARNOLD RAUM,
Judge

Entered May 19, 1958. Served May 21, 1958.

[Title of Tax Court and Cause Nos. 56085-6.]

PETITION FOR REVIEW

Margaret Lillian Ferguson, Newton Ivan Sherry, and Lois Sherry, the petitioners in the above entitled matters, heretofore consolidated for purposes of trial, by Charles H. Carr, their attorney, hereby file their Petition for Review by the United States Court of Appeals for the Ninth Circuit of the decisions by the Tax Court of the United States, entered on May 19th, 1958, Tax Court, Memo. 1958-32, determining deficiencies in the petitioners' Federal income taxes for the calendar years 1945 and 1946, as follows:

Margaret Lillian Ferguson: 1945, \$5,124.55; 1946, \$45,333.52.

Newton Ivan Sherry and Lois Sherry: 1945, \$5,123.17; 1946, \$45,760.54;

and said petitioners respectfully show:

I.

Jurisdictional Statement

The petitioners are residents of the Southern District of California and filed their respective income tax returns for the calendar years 1945 and 1946 with the Collector of Internal Revenue for the Sixth District of California, at Los Angeles, California; that, pursuant to the provisions of Section 7482(b)(1) of Title 26, U. S. Code, the venue for review of said decisions is the United States Court of Appeals for the Ninth Circuit.

II.

Nature of Controversy

Newton Ivan Sherry and Lois Sherry were, during the calendar years 1945 and 1946, husband and wife; Margaret Lillian Ferguson is the sister of Newton Ivan Sherry.

The controversy involves the proper determination of the petitioners' liability for Federal income taxes for the calendar years 1945 and 1946.

The controversy arises from the holding of the Commissioner of Internal Revenue that Newton Ivan Sherry and Margaret Lillian Ferguson were, during each of said years, co-partners with their father, Nathan Sherry (now deceased), and their stepmother, Lucille Lawler Sherry. Petitioner Lois Sherry's only connection with the issues involved is the fact that she filed joint returns with her husband, Newton Ivan Sherry. The deficiencies in income tax held by the Commissioner of Internal Revenue with respect to the years 1945 and 1946 arose entirely from the failure of the petitioners to include income from the alleged partnership in their personal income tax returns.

III.

Relief Sought

The said petitioners, being aggrieved by the Findings of Fact and Conclusions of Law contained in the Memorandum Findings of Fact and Opinion of the Court, and by its decisions pursuant thereto, desire to obtain a review thereof by the United

States Court of Appeals for the Ninth Circuit.

/s/ CHARLES H. CARR,

Counsel for Petitioners

Duly Verified.

[Endorsed]: T.C.U.S. Filed June 16, 1958.

[Title of Tax Court and Cause Nos. 56085-6.]

CERTIFICATE

I, Howard P. Locke, Clerk of the Tax Court of the United States, do hereby certify that the foregoing documents, 1 to 30, inclusive, constitute and are all of the original papers as called for by the "Designation of Contents of Record on Review", including Respondent's Exhibits A through J, attached to Stipulation of Facts and Respondent's Exhibits K, L and M, admitted in evidence, in the cases before the Tax Court of the United States docketed at the above numbers and in which the petitioners in the Tax Court have filed a petition for review as above numbered and entitled, together with a true copy of the docket entries in said Tax Court cases as the same appear in the official docket in my office.

In testimony whereof, I hereunto set my hand and affix the seal of the Tax Court of the United States, at Washington, in the District of Columbia, this 8th day of July, 1958.

[Seal] /s/ HOWARD P. LOCKE,

Clerk, Tax Court of the United
States

The Tax Court of the United States

Docket Nos. 56085, 56086 and 56087

MARGARET LILLIAN FERGUSON, et al.,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

TRANSCRIPT OF PROCEEDINGS

Court Room No. 10, Federal Building, Los Angeles, California, April 15, 1957—11:00 a.m.

(Met pursuant to notice.)

Before: Honorable Arnold Raum, Judge.

Appearances: Charles H. Carr, Esq., and William K. Rasmussen, Esq., Suite 403, 417 South Hill Street, Los Angeles 13, California, appearing on behalf of the Petitioners. Mark Townsend, appearing on behalf of the Respondent. [1*]

* * * * *

Whereupon,

HERNDON HUGHES

called as a witness for and on behalf of the Petitioners, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name, Mr. Witness, and your address.

* Page numbers appearing at top of page of Reporter's Transcript of Record.

(Testimony of Herndon Hughes.)

The Witness: Herndon Hughes, Residence address?

The Clerk: That's all right.

The Witness: 313 Blythe Road, Pasadena.

Direct Examination

Q. (By Mr. Carr): What is your occupation, please? A. I am an accountant.

Q. And how long have you been so employed?

A. Approximately 15 years.

Q. Were you acquainted with Mr. Nathan Sherry before [7] he was deceased?

A. I was.

Q. And did you have anything to do with his drawing up a partnership agreement?

A. Yes. I was an accountant for Mr. Sherry at the time that partnership was drawn.

Q. What was Mr. Sherry's business at that time, Mr. Nathan Sherry?

A. He was a restaurant-bar owner.

Q. And I believe, if I may not lead too much—counsel, you call me if I do—that there were several restaurants involved in the partnership, were there?

A. I think there were six, yes, sir.

Q. The name of that company?

A. S & P Company was the primary partnership.

Q. Who were the partners, do you know?

A. Mr. Nathan Sherry, Mr. Paul Kalmanovitz.

(Testimony of Herndon Hughes.)

Q. Did Mr. Sherry consult with you about setting up a family partnership?

A. Yes, sir, he did.

Q. And did you do anything as a result of that?

A. Yes, sir.

Q. Tell us what you did.

A. Mr. Sherry talked to us about the possibility of a partnership, and I believe that Mr. George Williams is the name [8] of the attorney that was called in, and we had a conference in which Mr. Williams, Mr. Sherry, myself, I believe my partner, Paul Yessner, were present.

Q. May I interrupt you? Mr. Williams is dead, is he not?

A. I don't know, Mr. Carr.

Mr. Carr: Counsel, I believe you will stipulate——

Mr. Townsend: We have so stipulated.

Mr. Carr: That is right, the attorney is dead.

Q. (By Mr. Carr): As the result of that did Mr. Williams draft an agreement?

A. He did. He drafted a partnership agreement.

Q. And that——

Mr. Carr: I take it, counsel, the stipulation is that that is the agreement which is on file?

Mr. Townsend: Right.

Q. (By Mr. Carr): As a result of that, did you draft some gift tax returns?

A. Oh, yes, sir.

(Testimony of Herndon Hughes.)

Mr. Carr: May I see that just a moment, your Honor?

Q. (By Mr. Carr): Will you just find, if you can, the two gift tax returns there, please, Mr. Hughes?

Are those the ones you prepared, or copies, rather, [9] photostatic copies of the ones you prepared? A. Yes, sir.

Q. Now, did you ever at any time to your knowledge know——

The Court: Did you identify them with exhibit numbers?

The Witness: The Exhibit I and J.

Q. (By Mr. Carr): Did you ever at any time hear Mr. Sherry, Mr. Nathan Sherry, have a conversation or discuss those gift tax returns or the partnership agreement with either one of the children, Margaret or Newton? A. No, sir.

Q. Did you ever at any time have any discussion yourself with either Margaret or Newton before these returns were prepared or during the time? A. No, sir.

Q. Were you acquainted with the operation of the business? A. Yes, sir.

Q. To your knowledge, did either one of these children ever have anything to do with the business operation?

A. At the time these returns——

Q. Or after, yes.

A. I wouldn't say after, Mr. Carr, but at the time that the gift tax return was filed I am quite

(Testimony of Herndon Hughes.)

sure that neither of the children had anything to do with the partnership.

Q. They were away in service, weren't they?

A. Yes, sir.

Q. Do you remember when they returned from the service?

A. No, sir, I don't, but in my recollection, they were both in the service until some time in 1945.

Q. And during that period of time who, if you know, attended to the books of the partnership? That was known as Sherry Enterprises, is that right?

A. This partnership was known as Sherry Enterprises.

Q. That is the one in which the wife and the two children and Mr. Sherry were partners?

A. That is correct. I believe that Mr. Maurice Kahn had the records. I am not quite sure about that.

Q. Was he in your firm?

A. Yes, he was in our office, not in our firm.

Q. The books and records, the work done on them, the preparation of the partnership returns was done by whom?

A. By Mr. Kahn or myself. The returns I prepared myself.

Q. At whose request?

A. At Mr. Sherry's request.

Q. And by that you mean Mr. Nathan Sherry?

A. Yes.

Q. Now, did you ever receive a request at any

(Testimony of Herndon Hughes.)

time from either of these two children, Margaret or Newton, to prepare a tax return in connection with that partnership?

A. When was the last partnership return? [11]

Q. We are dealing with '45 and '46 here, '44, '45, and '46.

A. As I recall it, Mr. Carr, the children came out of the Service, came home from the Service in the latter part of 1945, and shortly thereafter, shortly after their return I saw both of them within the first month, I would say, after their return, I saw both of them. We had some discussions, business, and what they planned to do.

Q. I am not talking about generally now. I am talking about, did either one of these children ever specifically ask you at any time to prepare a partnership return?

A. No, no, Mr. Sherry would be the one.

Q. Mr. Nathan Sherry is the one who made the request?

A. The person who asked us to prepare the return.

Q. Will you turn to the exhibits, the returns of the two children, the individual returns? Do you find those? Give me the exhibit numbers, please, the letters.

A. Yes, I have them.

Q. Give us the letters, will you, please?

A. Margaret Lillian Sherry for the year 1945 is Exhibit A; Margaret Lillian Sherry for the year 1946 is Exhibit B; Newton Ivan and Lois Sherry

(Testimony of Herndon Hughes.)

for the year 1946 is Exhibit D, and Newton Ivan and Lois Sherry for the year 1945 is Exhibit C.

Q. Now, those returns were prepared by your concern, were they? A. Yes, sir. [12]

Q. And——

A. Wait one moment, with the exception of Exhibit D.

Q. That is the return of whom?

A. No, with the exception of Exhibit B and D.

Q. Now, they are what?

A. That is the 1946 return of both children; that would be Margaret.

Q. Now, A and C are the returns for 1946, is that correct? A. '45.

Q. I mean '45, thank you. A. Yes, sir.

Q. Now, those were prepared by your——

A. Yes, sir, myself.

Q. Your firm? A. I prepared them.

Q. And where did you send them to, to have the children sign them, and at whose request?

A. I would have to call on my recollection. My recollection is, I gave the returns to Mr. Nathan Sherry. That would be the returns for himself and his wife, Sherry Enterprises, and Margaret and Newton's returns, and Mr. Sherry had them delivered back to me. That is my recollection. To tell you specifically what happened, I can't, Mr. Carr.

Q. All I am asking is your best recollection. Then, as [13] I understand it, at no time did either Margaret Sherry or Newton Sherry ever ask you to prepare those individual returns, is that correct?

(Testimony of Herndon Hughes.)

A. For '45 I am sure not, yes, sir.

Q. You didn't prepare the '46, did you?

A. That is right.

Q. So your answer is, as I understand it, you were not requested?

A. I am sure not, yes, sir.

Q. By them. Who did request you to prepare those returns, or your firm?

A. Well, things like this more or less happen, Mr. Carr. We were preparing the returns for the partnership, and during the course of the year you plan on what your estimate is going to be, and at the early part of the year 1945—and this again is my best recollection—neither of the children were present; neither of the children were here, and I am certain at the time that that estimate was filed and we got started into the return for the year 1945, that my conversation was exclusively with Mr. Sherry.

On the children's return I did—I mean upon their arrival back in Los Angeles I did talk to them, and to tell you that they never said anything to me about their individual returns I couldn't say that. That was just a growth from what we have been doing, and I prepared the returns. [14]

Q. Were you acquainted with whom it was that was operating the partnership, the S & P partnership?

A. Yes, sir.

Q. Who?

A. Mr. Sherry and Mr. Paul Kalmanovitz.

Q. Paul Kalmanovitz?

A. Yes.

(Testimony of Herndon Hughes.)

Q. And as far as the Sherry Enterprises partnership were concerned during the years 1944 and '45—I will stop there first; as far as you know, who was making the—who was managing the partnership?

A. Mr. Sherry, Nathan Sherry.

Q. Now we will come to 1946. To your knowledge did either one of the children participate in any way in the partnership in 1946?

A. Not to my knowledge, Mr. Carr.

Mr. Carr: May I have just one moment?

I think that is all.

Cross Examination

Q. (By Mr. Townsend): What would be the basis for your knowledge of whether or not these children——

A. My recollection here—I was just looking at the returns. The partnership return for the year 1946 is not here.

Q. I believe it is—— [15]

A. Oh, it is for the fiscal year ending June 30, 1946. I beg your pardon. Yes, it is here.

Mr. Townsend: May I have the question read?

(The question was read.)

Q. (By Mr. Townsend): ——participated in the operation of the Sherry Enterprises during the year '46 and the latter part of '45?

A. It would be my recollection, sir,—I don't recall that——

Q. My point is this, Mr. Hughes: Were you

(Testimony of Herndon Hughes.)

ever down in the office where they worked; were you ever down there fairly often or regularly?

A. Yes.

Q. Where you would observe what was going on?

A. Your questions here are regarding the Sherry Enterprises?

Q. That is correct.

A. The Sherry Enterprises was a—not an operating company in and of itself. The activities of the Sherry Enterprises were nominal indeed. There was no office for Sherry Enterprises, to my knowledge.

The Court: What was Sherry Enterprises?

The Witness: Sherry Enterprises, sir, was a co-partnership which held the interest formerly belonging to Mr. Nathan Sherry in an operating partnership which in its later [16] years was nothing but the S & P Company.

The Court: What was that, a corporation?

The Witness: No, that was another partnership. Is my answer clear? May I——

Mr. Carr: Certainly, the Court asked you to explain it.

The Witness: The S & P was an operating partnership that had a number of restaurants and as I recall it in those days a bowling alley and several bars, and the operation of that company with a lot of employees and a lot of large office facilities. Mr. Nathan Sherry was at all times during the years here involved a co-partner of record in that partnership.

(Testimony of Herndon Hughes.)

The Court: The S & P?

The Witness: That is correct, but the Sherry Enterprises——

The Court: What was the scope of his interest in S & P?

The Witness: Fifty percent interest. He owned a 50 percent interest in S & P Company.

The Court: Who owned the other 50 percent?

The Witness: Mr. Paul Kalmanovitz.

The Court: Who are the partners in—was Sherry Enterprises an effort to divide up Mr. Nathan Sherry's 50 percent interest?

The Witness: It did in substance that, yes, sir.

The Court: Who were the partners in Sherry Enterprises?

The Witness: Mr. Nathan Sherry, Mrs. Nathan Sherry, Lucille Lawler Sherry, Margaret and Newton, the four members of the Sherry family.

The Court: Go ahead.

Q. (By Mr. Townsend): Mr. Hughes, you spoke that you were in on this forming the instrument for the partnership agreement and also preparing the gift tax returns and the donee tax returns.

Did Mr. Sherry state to you at the time what his purpose was in asking for those instruments?

A. Yes, sir. We had a discussion——

Mr. Carr: You mean Mr. Nathan Sherry?

Mr. Townsend: Yes.

A. I believe that the first discussion on this was probably in '43, Mr. Townsend.

In any event, the children were in the Service,

(Testimony of Herndon Hughes.)

and if it wasn't in '43 it was early in '44, and Mr. Sherry discussed at some length his family problems, his desire to protect the children, and as a result of those conferences the idea or the nucleus, his desire to protect them, the nucleus of the Sherry Enterprises was born and went from that to the attorney and from the attorney to the draft of the partnership form and back. [18]

Q. (By Mr. Townsend): Was there anything to lead you to believe that what was intended here was a sham partnership for tax purposes?

Mr. Carr: Well, I will have to object to that question. I think it is a little bit compound, complex, and I think he is entitled to state what was said. I don't want to be technical about it, but you are asking him——

Mr. Townsend: Was there anything said that would lead him to believe.

Mr. Carr: If you will leave out the word "sham" I think that——

Mr. Townsend: Let me try and rephrase the question.

Q. (By Mr. Townsend): Was anything said that would lead you to believe that this partnership was set up for tax purposes only?

A. The tax advantage was during the course of the conversations that ensued, discussed. The purpose of the corporation, as it was explained to me by Mr. Sherry—of the partnership, I am sorry—of the partnership as it was originally conceived and discussed with me by Mr. Sherry, Mr. Nathan

(Testimony of Herndon Hughes.)

Sherry, was an effort to divide his estate rather than income and protect his children by so doing.

Q. Give them a current interest in the business?

A. That would be my recollection.

The Court: Who suggested it, did you?

The Witness: No. [19]

The Court: Did your firm suggest it?

The Witness: No, sir. The suggestion initially came to me from Mr. Sherry himself, Mr. Nathan Sherry himself, as I recall it now, during a lunch. He was telling me of his effort to do something with his estate that would protect the children.

It started out actually talking about Newton who, I believe, was in the South Pacific at the time and he just had a letter from him, and that was the inception of the conversation.

The Court: Did you think in some way that you were effectively dividing up Mr. Nathan Sherry's 50 percent interest?

The Witness: Well, the attorney led us to believe that that is exactly what we were in effect doing.

Q. (By Mr. Townsend): Mr. Sherry also had income from other sources, didn't he, Mr. Hughes?

I believe if you look at your partnership return there you will find that there were additional sources besides the S & P partnership. I believe there was a corporation also, was there not, the S & P Corporation?

A. Gosh, was this '46 after the S & P was incorporated? I don't know.

(Testimony of Herndon Hughes.)

Mr. Carr: If I remember correctly, the S & P was incorporated in the latter part of '46 or some time around there. [20]

Mr. Townsend: Those returns speak for themselves and show other sources of income besides the S & P partnership; is that correct, Mr. Hughes?

The Witness: Yes.

Q. (By Mr. Townsend): Hollywood Cafe and a number of other items?

A. Yes, sir. In the year—we are calling it '46, it is actually the fiscal ending June 30, '46, there were several firms with which Mr. Sherry was associated reflected on the return.

The Court: Were they all partnerships or were they corporations or what were they?

The Witness: Your Honor, it has been so long; I recall that the Hollywood Recreation was a corporation. That's my recollection. Brooks Cafe was a partnership. C. R. Smith was a partnership. San Francisco was a partnership. And of course the big one was a partnership until Mr. Carr has just given you the date—it was a partnership up until—it must have been late in '46.

Do you know the date, Mr. Carr?

Mr. Carr: I don't know the date.

The Court: Did Mr. Nathan Sherry have a 50 percent interest in each one of these enterprises, whether they be corporations or partnerships?

The Witness: No. [21]

Mr. Carr: May I say one thing? It might clarify it. He had interests, a piece of this business, a piece

(Testimony of Herndon Hughes.)

of that business, 50 percent of this and 25 percent of this, which are not really involved here at all. But he had a 50 percent interest in S & P and he attempted to split that 50 percent four ways between the four members of his family, and the partnership Sherry Enterprises, namely, his wife, himself, and his two children, with a fourth each.

Mr. Townsend: I gather from these partnership returns that there is involved in the Sherry Enterprises more than the interest in the S & P Company.

Mr. Carr: Well, at varying times there was a sort of an in-and-out proposition. There would be some cafe in and then the next time some cafe out, but the major portion of the business—maybe I should put it this way—was the S & P partnership.

The Witness: The big portion—

The Court: May I have these exhibits, and will counsel please make other copies available to the witness so that I can follow this testimony?

Mr. Carr: Yes, your Honor.

The Court: Proceed.

Q. (By Mr. Townsend): Mr. Hughes, when you prepared these partnership returns, and I believe you prepared both of the returns that [22] are in evidence today, didn't you? A. Yes.

Q. Did you feel that this was a bonafide partnership when you prepared these returns?

A. Yes, sir.

Q. When you prepared these gift tax returns did you feel that a bonafide gift had actually taken

(Testimony of Herndon Hughes.)

place? A. Yes, sir.

Q. You did not feel at all that this was a fictitious partnership, did you?

Mr. Carr: I will have to object to what he feels. I think that is a question for the Court, your Honor. I object to it on the ground it calls for an opinion.

Mr. Townsend: I think this witness is well qualified to give that opinion.

The Court: He said he thought they were valid.

Mr. Carr: I will let it go that far, but I thought I ought to stop somewhere.

The Court: Mr. Hughes, some of these returns are signed by you and others are not, but your firm name appears to be stamped underneath the signature of some other person, apparently purporting to be associated with your firm.

Were all those returns prepared either by you or under your direction?

The Witness: Yes, sir. Paul Yessner is my partner, [23] your Honor.

The Court: So where his signature appears they are nevertheless prepared under your direction or in conjunction with you?

The Witness: Yes, sir.

The Court: Thank you.

Q. (By Mr. Townsend): Mr. Hughes, I show you what has been marked for identification as Respondent's Exhibit K and L and ask you to identify them, if you can, please.

Mr. Carr: You can just state what they are. I don't require you to lay a foundation.

(Testimony of Herndon Hughes.)

A. This Exhibit K is a report of an Internal Revenue agent on Mr. Newton Sherry's return for the year 1945, the report being dated September 9, 1948, made by Agent—I believe I can't tell you that.

Q. (By Mr. Townsend): Well, in summary, that is a revenue agent's report on the case of——

A. Newton Sherry for the year 1945.

Q. And on Margaret Sherry for the same year, which reflects adjustments to the Sherry Enterprises income and increases these petitioners' share of that income, is that correct?

A. That is correct, yes, sir. [24]

Q. Did you represent Newton Sherry and Margaret Sherry Ferguson at the time of this revenue agent's report and finding?

A. No, sir, I am sure I did not.

Q. This was with Revenue Agent Propeck, Mr. Hughes. Did you consult with him?

A. This was made in 1948.

Q. Correct.

A. I am sorry I haven't my file, but I am rather certain that I didn't have any of the records of Sherry Enterprises at this time.

You would be able to answer that question. I would have to say I don't think so, Mr. Townsend. I don't believe that——

Mr. Townsend: I have no further questions.

Mr. Carr: May I have just one further question?

Redirect Examination

Q. (By Mr. Carr): May I ask if anything you

(Testimony of Herndon Hughes.)

did do on behalf of Margaret or Newton Sherry was at the request of Mr. Nathan Sherry?

A. That would be completely so, with the possible exception of their individual return for the year—the last return I prepared.

Now, the children were back by that time, Mr. Carr, and I talked to the children and——

Q. You didn't prepare the '46 return though, did you? [25]

A. I don't believe I did.

Q. Well, that is what I am asking. You take a look.

A. May I ask you, when did the children come back?

The Court: You may not ask counsel questions.

The Witness: Then I can't answer with definite knowledge.

Q. (By Mr. Carr): Look at the return for the fiscal year.

A. But I couldn't tell whether I discussed anything on that with them by looking at it.

Q. You can tell whether you prepared it?

A. I certainly did prepare the return.

Q. Look at your '46 return. Did you prepare that for the two children?

A. No, sir, the '46 I did not prepare.

Q. That is the fiscal year ending——

A. This is for the children now you are talking about?

Q. That's right, for the children.

(Testimony of Herndon Hughes.)

A. No, sir, I did not prepare the children's return for '46.

Mr. Carr: That is all. No further questions.

Recross Examination

Q. (By Mr. Townsend): The 1945 return which you did prepare for the children was of course filed on March 15, 1946? [26] A. Yes, sir.

Q. Could that be the return that you have been referring to?

A. I wouldn't say that I did not discuss anything with respect to the children's return after they came back to the city; I probably did. But it was Mr. Newton Sherry that had instructed us to originally proceed.

Mr. Townsend: I have no further questions.

The Witness: I mean Mr. Nathan Sherry.

Further Redirect Examination

Q. (By Mr. Carr): I hate to keep doing this, but to refresh your recollection, don't you recollect that Margaret Sherry did not return from the Service until November of 1945?

A. I don't remember when she came back, Mr. Carr.

Q. Do you recollect that Mr. Newton came home from the Marines in May 1945 and went into a hospital?

A. I don't think I saw Newton until after he got out of the hospital, and I don't know what the date was when either of them got back.

(Testimony of Herndon Hughes.)

Q. But you didn't discuss, I take it, then, anything with either one of them until their return from the Service?

A. Some weeks after they got back to town.

Mr. Carr: That is all.

Mr. Townsend: That is all. [27]

Mr. Carr: May he be excused, your Honor?

Mr. Townsend: Yes.

The Court: You may be excused.

(Witness excused.)

Whereupon,

NEWTON SHERRY

called as a witness for and on behalf of the Petitioners, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name and address, please, Mr. Witness?

The Witness: I didn't hear you.

The Clerk: State your name and address, please.

The Witness: Newton Sherry, 2210 Graham Avenue, Redondo Beach.

Direct Examination

Q. (By Mr. Carr): What is your occupation?

A. I am a painter.

Q. What kind of painter?

A. House painter.

Q. You work for wages?

A. That is right.

Q. And how old are you?

A. I am 37. [28]

(Testimony of Newton Sherry.)

Q. Do you hear well? A. Not too well.

Q. As a matter of fact, you more or less read lips, don't you? A. That is right.

Q. To understand.

I bring it out, counsel, so if you will face him when you talk to him.

Now, Mr. Sherry, do you remember a partnership agreement that you signed setting up Sherry Enterprises?

A. Well, as far as that goes, the only one that I remember was signing overseas.

Q. Where were you at the time you signed this agreement?

A. I was at Guadalcanal at the time.

Q. I will use this copy, your Honor, and I am referring now to Exhibit—this is the petitioner's exhibit; that is Exhibit G, I believe. Is that your signature, Mr. Sherry? A. That's right.

Q. Where were you at the time you signed that?

A. At Guadalcanal.

Q. What were you doing there at Guadalcanal?

A. Well,——

Q. What was your business? I don't mean what were you doing at the moment. What was your business?

A. Oh, I was a Sergeant in the Marine Corps.

Q. And you say you signed that?

A. That's right.

Q. Did you read the agreement when you signed it? A. Not particularly.

Q. Well, did you or didn't you?

(Testimony of Newton Sherry.)

A. No, I didn't.

Q. Well, who asked you to sign the agreement?

A. My dad sent me a letter for me to sign it.

Q. And you signed it? A. Yes.

Q. What did you do with it, mail it back to him?

A. That is right.

Q. Now, when did you return from the Marine Corps?

A. It was about March of 1945, and then I went to the hospital, and I was transferred to the Philadelphia Hospital.

Q. How long was it before you returned to Los Angeles?

A. It was—well, it wasn't until about May 1945.

Q. In the meantime you had been, on your return to the country, you had been in the hospital?

A. That is right.

Q. Incidentally, is that during the time you were looking to lip read? A. That is right.

Q. Now, do you remember signing any tax returns for the Sherry Enterprises? [30]

A. No, sir, I don't.

Q. Let me show you your signatures here and see if you recognize them.

By the way, you were married to Lois Sherry when? A. In 1940, January.

Q. Are you living together now or separated?

A. No, we are separated.

Q. Do you have any children?

A. Well, not by her.

Q. How many children do you have?

(Testimony of Newton Sherry.)

A. I have four.

Q. Four children.

Now, I want to show you Exhibit C. Is this your signature? No, that is not the one. Just a moment. Is that your signature?

A. That looks like it. I believe it is.

Q. Do you know whether or not your father signed your name at any time to any of these things?

A. I checked some signatures over, and I know that he signed one of them.

Q. Which one, do you know which one he signed?

A. No, sir, I don't.

Q. Now, do you recollect signing a tax return for 1944 for yourself individually, that is, you and your wife, for 1944? [31]

A. I can't recall, I am sorry.

Q. Do you remember signing one for 1945?

A. No, sir.

Q. Do you remember signing one for 1946?

A. I don't remember, no, sir.

Q. Now, I will show you the return which is Exhibit B for 1946. I take it—there is an "X" by that Newton Ivan Sherry. Is that your signature?

A. It looks like it, yes, sir.

Q. You think you signed that one?

A. I believe so.

Q. Do you know where you got that return to sign it?

A. Oh, it has been so long ago, I mean I couldn't recall.

(Testimony of Newton Sherry.)

Q. Let me ask you this: Do you remember signing—when it was you signed the partnership agreement? You say it was in Guadalcanal?

A. Yes, sir.

Q. Remember about when it was?

A. I believe it was in 1943 or '44, somewhere in there.

Q. Did you ever at any time receive any funds from the Sherry Enterprises partnership?

A. No, sir.

Q. Not a nickel? A. No, sir. [32]

Q. Did you ever at any time pay any taxes, as far as you know, to your own knowledge, on any income for the Sherry Enterprises?

A. No, sir.

Q. Or for your share of it?

A. That is right.

Q. You don't remember ever paying any?

A. No, sir.

Q. Did you ever ask anyone to prepare a partnership agreement? A. No, sir.

Q. Did you ever ask anyone to prepare tax returns for you?

A. No, sir, not during that period of time.

Q. I am talking now about 1944, '45, '46.

A. No, sir.

Q. Just what did you know about the Sherry Enterprises?

A. Actually, I didn't know anything.

Q. Mr. Nathan Sherry, I believe, was your father? A. That's right.

(Testimony of Newton Sherry.)

Q. And when had you joined the Marine Corps?

A. In 1940, January.

Q. 1940? A. Yes, sir.

Q. And you were discharged when? [33]

A. 19—May of 1945.

Q. Now, during the time that you were back in Los Angeles did you work for your father at any time? A. I did.

Q. Where did you work?

A. I worked at the Bayview in Wilmington.

Q. Wilmington, California?

A. That is right.

Q. What was that?

A. It was a, well, combination, a drive-in and bar.

Q. Do you know who owned that?

A. I believe it was Mr. Paul and my dad.

Q. Who is that?

A. Paul Kalmanovitz.

Q. Paul Kalmanovitz? A. Yes.

Q. And your father—you think they owned it?

A. It was S & P, I am sure.

Q. Did you get a salary while you worked there?

A. I got a manager's salary.

Q. How much salary did you get?

A. I believe it was about \$110.00.

Q. For what period? A. For what—

Q. For what period, a week, a month, or what?

A. No, that was a week.

Q. And did you have anything to do with making out the books and records?

(Testimony of Newton Sherry.)

A. No, sir.

Q. Did you have anything to do with the income tax returns for that particular business where you worked?

A. No, sir, they were all turned in.

Q. Who handled that?

A. They had an office up on Vine that handled all that.

Q. Did you have anything to do with the office on Vine Street?

A. No, sir.

Q. Didn't you go to school for a while after you got out of the hospital?

A. I did. That was after I was discharged in May of 1945.

Q. By the way, what does your former wife do? Are you divorced from Lois Sherry?

A. No.

Q. What does she do, do you know?

A. She works as an I.B.M. operator at Michigan Gas & Appliance.

Q. When did you get out of college, when did you finish this college course?

A. Well, I actually didn't complete it. My dad called [35] me down and wanted me to participate in being a manager at the Bayview.

Q. At the Bayview in Wilmington?

A. In Wilmington, yes, sir.

Q. When was that, do you remember about when it was?

A. Well, it was right after I was—I quit school. I had some paper to that effect of when I quit

(Testimony of Newton Sherry.)

school, because that was the reason why I quit college at that time.

Mr. Carr: Do you want to see these, counsel? His college papers showing his attendance there?

The Witness: I never did receive any grades or anything.

Mr. Carr: Just for purposes of refreshing his recollection to get a date.

Q. (By Mr. Carr): I will show you here what purports to be a California State Polytechnic record. Do you recognize that? A. Yes.

Q. See if that refreshes your recollection, if you can remember the date after looking at it.

A. It would be about the eleventh month of 1945, in other words, that I went to work at the Bayview.

Q. Eleventh month, you mean November?

A. Yes, sir.

Mr. Carr: No further questions. [36]

Cross Examination

Q. (By Mr. Townsend): Can you understand me from here, Mr. Sherry? A. Yes, sir.

Q. I believe you testified that your father sent you that partnership agreement along with a letter?

A. That's right.

Q. That you didn't read the partnership agreement, but I presume you read the letter?

A. Yes. He just in the letter informed for me to sign some papers.

Q. What did he tell you the papers were for, in the letter? A. To tell me what?

(Testimony of Newton Sherry.)

Q. What did he tell you the papers were for in his letter?

A. Well, he didn't actually state in the letter what they were for.

Q. He didn't tell you in the letter that he was setting up a partnership? A. No, sir.

Q. He just said in his letter, "Here are some papers, sign them?" A. Yes, sir.

Q. He didn't say anything about he wanted you to go into [37] business with him when you came out of the Marine Corps? A. No.

Q. Or he wanted to protect your future?

A. No, sir.

Q. He said nothing in this letter about it?

A. No, sir.

Q. And you just took this document and signed it? A. Yes, sir.

Q. Now, when did you first find out about the partnership?

A. Well, a while after I got back, in other words, when I got discharged from the Service, then I went to school, and then it was at a later date that I heard that I had had some word that there was a partnership.

Q. Could you go a little more into detail? How did you get the word and when?

A. I had heard it discussed between Mr. Paul and my dad.

Q. You heard the Sherry Enterprises discussed between Mr. Paul and your dad?

A. Yes, sir.

(Testimony of Newton Sherry.)

Q. Now, have we identified exactly which returns you signed there, your individual returns?

A. Well, actually, I don't remember all these.

Q. Excuse me. Let me pick them out for you here.

A. In other words, he brings something in and says, "Sign this." I'd sign this, you know, you trust your dad that [38] way.

Q. Referring to Exhibits C and D, which purport to be your individual income tax returns for 1945 and 1946, are those your signatures on both of them? A. I believe they are, sir.

Q. You did sign them. Now, you looked at those returns when you signed them, didn't you, Mr. Sherry?

A. I don't remember looking at anything that I signed, as far as that goes, because if he'd tell me to sign something I'd sign it.

Q. You knew it was an income tax return, didn't you?

A. No, sir, a lot of times I didn't.

Q. Let's look at those two particular ones. How about when you signed those, did you know what they were?

A. He'd put it in front of me and tell me to sign it, like that.

Q. You knew what you were doing when you signed that return, didn't you?

A. Well, what I was doing in signing that, no, sir. I mean he put a lot of things in front of me and would tell me to sign it, I'd sign anything. It

(Testimony of Newton Sherry.)

is just like buying an automobile, you don't read everything.

Q. You knew that that return was going to be filed with the government, didn't you?

A. No, sir, I didn't. [39]

Q. Had you ever heard of the income tax laws before? A. No, sir.

Q. You received a salary, I believe, in 1946 from the S & P Company, didn't you, Mr. Sherry?

A. To whom?

Q. From the S & P Company?

A. In what year?

Q. In 1946? A. That's right.

Q. You intended to report that income, didn't you, to the government? A. Yes, sir.

Q. Did you make some effort to find out whether that income had been reported or not?

A. Well, my dad, in other words, I followed everything, then Murray made those out.

Q. You knew what that was, didn't you, this one prepared by Mr. Murray, your 1946 return; you knew what that one was?

A. If I filled it out, I knew what it was.

Q. Let's take a look at it right there.

A. A lot of these I didn't have nothing to do with filling out anything.

Q. You were interested in reporting your salary from S & P Company, weren't you? [40]

A. That's right.

Q. You intended to do that?

(Testimony of Newton Sherry.)

A. I am interested in what I make as a partner now.

Q. This '46 return, Exhibit D, shows your salary from S & P Company of \$1,950.00. You knew you were reporting that, didn't you?

A. If it states that I imagine so.

Q. You looked at that particular return, didn't you? A. This was by Murray.

Q. You looked at that particular return, didn't you?

A. I don't remember whether I looked at it or not, because he might have filed it with him. In other words, just about all the business was done by my dad, in fact, everything was.

Q. Weren't you concerned with whether or not your income from S & P Company was reported to the government?

A. In that fact, I consulted my dad on it, on my income from S & P Company.

Q. And you made certain steps to make sure that that income was reported, did you not, the salary that you got?

A. That is right, in other words, he said that it was reported and I just signed.

Q. You looked at the report, did you not, to see if it included that salary?

A. I don't remember whether I did or not. [41]

Q. You don't remember whether you looked at the return or not when you signed it?

A. No, sir.

Q. So far as you know, I take it, so far as your

(Testimony of Newton Sherry.)

testimony goes, you don't know whether or not you ever reported any income from this partnership or from any other source, is that correct?

A. You are turning it around a little bit. I remember reporting what I have made since then, when I painted, I mean. Everything else was handled by him.

Q. Did you ever conduct any businesses for the Sherry Enterprises?

A. No, not actually, not conduct them myself.

Q. What did you do exactly when you came back from Guadalcanal?

A. When I came back from Guadalcanal?

Q. That's right.

A. I worked at the—I went down and worked at the Bayview for a while, and then I went back to painting for a while. Let's see, and after—I remember one business that I wasn't running that I was sent down to work at.

Q. What was that?

A. Well, that was at Miami. I was a laborer down there.

Q. What was the name of that business?

A. Oh, that was in later years. [42]

Q. Did you have anything to do with the Le Fleur de California? A. Yes.

Q. What was that?

A. That was established as a—Le Fleur was a perfume outfit.

Q. Right, and what connection did you have with that business?

(Testimony of Newton Sherry.)

A. Well, I participated and worked there myself.

Q. What connection did your father have with that business?

A. Well, it was his business, as far as that goes.

Q. Was that——

A. Anything that I was engaged in, I mean, he told me, "Do this, do that, you are in this, you are in that."

Q. Did you ever have meetings of the four family members that signed that partnership agreement?

A. Not that I recall.

Q. Did you ever have meetings in which business policies and plans were discussed?

A. No, sir, he never discussed anything with me, to speak of. I mean he is very close mouthed about business.

Q. You purchased a home in 1946, did you not?

A. 1946? Let's see, I believe so.

Q. For \$8,599.00, correct? [43]

A. That's right.

Q. Where did you get that money?

A. Well, he gave me the money, but it was returned to him afterwards, after it was sold. What year was that?

Q. 1946.

A. '46? It would be about that time. That was when I was working at the Bayview, as I recall.

Q. Did you ever do any work for Linda Gale, Incorporated?

A. What date was that?

Q. I don't know, Mr. Sherry.

(Testimony of Newton Sherry.)

A. Wasn't that at a later date?

Q. I don't know. I am asking you.

A. I believe that was in the year 1949.

Q. 1949, and who owned that company?

Mr. Carr: I object to going into 1949 unless it is a part of the partnership to reflect back. I don't see how it would have any bearing, your Honor. To me we are going into collateral matters.

The Court: What is the connection?

Mr. Townsend: I believe that subsequent events are admissible to show the intention of these parties back in these early years.

The Court: If you can tie it in, I will let you attempt to do so. [44]

Q. (By Mr. Townsend): What was Linda Gale, Incorporated?

A. Linda Gale, Incorporated? It was a partnership set up by Mr. Klein.

Q. What connection did your father have with it?

A. Well, my dad—my dad and Mr. Klein set it up in a business for me to work in it.

Q. Was that considered one of the assets of the Sherry Enterprises?

A. In a later date, yes.

Q. How about your home, was that considered to be your own asset or was that considered an asset of Sherry Enterprises?

A. What home?

Q. The home you purchased in 1946 for \$8,599.00?

(Testimony of Newton Sherry.)

A. That would have been Sherry Enterprise at that time.

Q. You didn't consider it your house?

A. No, sir.

Q. When did you consider yourself, if you ever did, a partner in Sherry Enterprises?

A. When did I consider myself a partner?

Q. Yes, or did you ever? A. I never did.

Q. You never considered yourself a partner?

A. No, sir.

Q. In Sherry Enterprises?

A. That's correct. [45]

Q. Did you have anything to do with the Martin Holding Company?

A. I don't recall that.

Q. The Martin Holding Company?

A. No, sir.

Q. You recall nothing about it?

A. No, sir.

Q. I show you what has been marked for identification as Respondent's Exhibit K, which is a waiver of restrictions on the assessment and collection of deficiency in tax, and ask you if that is your signature thereon.

A. Yes, sir, that is my signature.

Mr. Carr: I didn't hear the answer. What did he say?

Mr. Townsend: He said it was.

Q. (By Mr. Townsend): You will notice the date that that is signed?

A. July 19, 1948.

(Testimony of Newton Sherry.)

Q. What were the circumstances when you signed the particular instrument?

Mr. Carr: I am not objecting to this on the theory that you are going to connect it up. I assume that you will.

A. What were the circumstances?

Q. (By Mr. Townsend): Yes.

A. Most of this, I mean, it is—the same as that, [46] it's the same difference, what I am speaking about. I signed things a lot of times that I didn't know what they involved or anything else.

Q. Did you know when you were signing this that you were agreeing to an additional deficiency in tax of \$1,114.00?

A. I don't remember that.

Q. You don't remember that?

A. No, sir.

Q. Who told you to sign that?

A. My dad.

Q. When did your father die, Mr. Sherry?

A. When did he die?

Q. Yes.

A. It has been about, let's see, he died in January, about two years ago.

Q. Mr. Sherry, do you recall coming down to this building on November 2, 1949 with your attorney, Conrad Hubner and Mr. William Byrns, a special agent was here at that time. Do you recall that incident?

A. About seeing Mr. Byrns?

Q. That's right, in this very building.

(Testimony of Newton Sherry.)

A. Oh, very well. I remember Mr. Byrns. He got mad at me at that time.

Q. Do you recall that you gave a question-and-answer statement at that time? [47]

A. I remember he asked me some questions. I don't recall what questions they were.

Q. You remember that you testified under oath at that time, do you not? You remember being sworn in?

A. I don't remember whether he swore me in or not, sir.

Q. Were the answers that you gave at that time true and correct, as far as you knew then?

A. Well, it's just like trying to think back when you were a child or something. I mean I can't remember years back or five years or three years or something, I mean——

Q. In 1949 when you saw Mr. Byrnes and he asked you these questions, did you answer them truthfully, to the best of your ability?

A. The best of my ability, I imagine so.

Q. You didn't lie, did you? A. No, sir.

Q. Now, at that time that Mr. Byrnes was asking you questions, do you recall this question being asked and this answer being given by you:

“Q. Are you a partner in the partnership known as Sherry Enterprises? A. I am.”

A. At that time I guess, if that's what is in there, well,——

Q. So at that time in January of 1949 you ap-

(Testimony of Newton Sherry.)

parently [48] felt that you were a partner in Sherry Enterprises? A. That's right.

Q. But just a few moments ago you said that you had never considered yourself a partner in Sherry Enterprises?

A. Well, considering yourself and participating and receiving funds out of it that you can take and put in the bank and keep, it's a different thing.

Q I am just talking about what you considered and when you considered yourself a partner.

A. Well, I was no active partner.

Q. I am not asking you that. I am asking you when you considered yourself a member of Sherry Enterprises.

A. Just like I said in court a few minutes ago, I found out that—I was part of Sherry Enterprises as set up.

Q. When?

A. After I got out of the Service, and then when I came down to participate in the business.

Q. And that would be the end of '45, would you say?

A. No,—it was approximately at that time, yes.

Q. But during that time and for there on in you considered yourself then a member of Sherry Enterprises partnership?

A. You turned it around a certain way, but considering yourself and being a partner is two different things.

Q. I agree, it is up to the Judge to determine

(Testimony of Newton Sherry.)

that point. [49] We are just asking what you consider.

A. Well, I never actually considered myself at any time a partner, what you call a partner in anything.

Q. Then why did you tell Mr. Bryns in 1949 that you were a partner?

A. Because it was wrote up as a partnership.

Q. But the question asked was, "Are you a partner in the partnership known as Sherry Enterprises?"

According to you right there a few minutes ago, you said yes. A. That I said "Yes"?

Q. That right, you said, "I am."

A. "I am."

Q. At that time then apparently you felt yourself a bonafide member of that partnership?

A. Well, I don't know. I always thought a partnership was something different than what that was.

Q. You knew the reason that you were being asked questions on that answer-and-question statement? A. What?

Q. You know the reason why you were called down at that time and asked those questions under oath, don't you?

A. Not particularly, I mean I don't believe I recall.

Q. Do you recall that your father was being investigated at that time? [50]

A. I have heard something to that effect, yes.

Q. And you knew that at the time you came

(Testimony of Newton Sherry.)

down here and answered these questions, did you not? A. I believe so.

Q. And you also knew that at that time it would help your father if there was a partnership known as Sherry Enterprises?

A. I didn't know that.

Q. You didn't have that thought in mind when you answered these questions? A. No, sir.

Q. Was any of your money ever contributed to Sherry Enterprises? A. What?

Q. Was any of your money ever contributed to Sherry Enterprises?

A. To Sherry Enterprises?

Q. Yes.

A. Well, when my mother passed away, there was at that time.

Q. How much was that, Mr. Sherry?

A. Well, I never had the money in my hand or anything, but I heard that it was \$20,000.00, I believe. I know when I was a child that I went down to the bars that she had at that time. [51]

Mr. Carr: I will have to move to strike that on the ground that it is hearsay, your Honor, what he heard.

The Witness: That was just S & P, that wasn't Enterprises.

The Court: The Court will not consider any hearsay testimony.

Mr. Carr: I didn't think that you would, so I just——

(Testimony of Newton Sherry.)

Q. (By Mr. Townsend): Did you ever invest any money yourself in Sherry Enterprises?

A. I never had any money to invest, sir.

Q. Mr. Sherry, referring again to the date that you were down here on November 2, 1949, when Mr. William Bryns was interviewing you under oath, do you recall this question being asked you and your answer as follows:

"Q. In your opinion, what was the purpose of the formation of Sherry Enterprises partnership.

"A. Well, the formation, in other words, is between all of us. The money was put in in case anything should happen to my dad, we would still have a partnership. Also, there was money that was left to us that made up the partnership. Also, there was money I invested that made up the partnership."

Do you recall that question and that answer, Mr. Sherry? [52]

A. No, sir, it's been so long ago.

Q. Do you deny that now?

A. No, sir, I won't deny it.

Q. Those facts I am talking about?

A. Well, over a period of years people, you know, they forget things unless your mind is a photographic mind, like some people have.

Q. Well, let's just take the one part. "Also, there was money I invested," that made up the partnership, is that true or not? A. It what?

Q. "Also there was money I invested that made up the partnership;" is that true or not?

A. Well, the part that may be—participating to

(Testimony of Newton Sherry.)

"I invested" would have been the money left through my mother at an earlier date, I imagine.

Q. Let me read you that sentence again, "Also, there was money that was left to us that made up the partnership. Also, there was money I invested that made up the partnership."

A. I don't remember investing any money, sir. Sometimes people ask you questions and it is rather confusing the way Mr. Bryns asked me those questions. They turned them all around and all.

Q. Do you recall this question being asked you on the same date, which is November 2, 1949, by Mr. Bryns and your [53] answering as follows:

"Q. Since the formation of Sherry Enterprises has there ever been a meeting of all the four partners in which business policies and plans were discussed?"

"A. Well, at different times, if ever we wanted any type of business whatsoever added to the Sherry Enterprises, we would all get together and have a mutual agreement."

A. I don't remember stating that. I could have stated it, but I don't remember us getting together, to speak of.

Mr. Townsend: No further questions.

Mr. Carr: May I just ask one or two short questions?

Redirect Examination

Q. (By Mr. Carr): Mr. Nathan Sherry, your father, was a very aggressive man, wasn't he?

A. What?

(Testimony of Newton Sherry.)

Q. Aggressive man. A. That's right.

Q. And when he spoke to you, did he ask you to do something or tell you to do something?

A. He told me to do it.

Q. And did you do what he told you to do?

A. I always did, yes, sir. [54]

Q. No matter what it was?

A. No, sir, didn't matter what it was.

Q. If it were wrong, would you do it too?

A. I would still do it. I happen to love him that much.

Q. Your father and you were very close, weren't you? A. How is that?

Q. Your father and you were very close?

A. Speaking that way, I mean, as far as love for him it was close that way.

Q. Did he ever tell you anything about what he was doing in business?

A. No, sir, not to my knowledge.

Q. By the way, one other question. Your dad was later, do you remember, indicted some time after that statement was given? You know what "indicted" means, prosecuted in the Federal Court for tax evasion? A. Yes, sir.

Q. Mr. Byrns was a special agent who was investigating him at that time, is that correct?

A. Well, it must have been Mr. Byrns because that was the one that I came down to see there one time.

Mr. Carr: I think that is all.

Mr. Townsend: I have no further questions.

The Court: We will reconvene at 2:00 o'clock.

(Whereupon at 12:15 p.m., a recess was taken until 2:00 p.m. of the same day.) [55]

Afternoon Session—2:00 p.m.

The Court: Have these cases been consolidated?

Mr. Townsend: No, they have not.

The Court: Does counsel wish to make a joint motion for this purpose?

Mr. Carr: Yes, we join in the Court's suggestion and move that they be consolidated.

Mr. Townsend: The respondent so agrees.

The Court: The cases will be consolidated, and the evidence received thus far will be treated as having been received in the consolidated hearing.

Mr. Townsend: So stipulated.

Mr. Carr: So stipulated.

Whereupon,

MARGARET FERGUSON

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name and address, Miss Witness. You may be seated.

The Witness: My name is Margaret Ferguson. I live at 1810 Courtney Avenue, Los Angeles 46.

Direct Examination

Q. (By Mr. Carr): Mrs. Ferguson, you were formerly Margaret Sherry, [56] is that correct?

A. That is correct.

(Testimony of Margaret Ferguson.)

Q. You are the daughter of the deceased, Nathan Sherry? A. That is correct.

Q. Now, I want to draw your attention particularly to the years beginning about 1943 and through the years up until the fiscal period ending June, 1948.

First of all, where were you in February of 1943?

A. I went into the Service in February, 1943.

Q. What branch of the Service?

A. The Navy.

Q. You mean the Waves?

A. That's right.

Q. How long were you in the Waves?

A. Almost three years.

Q. When did you go in?

A. February, 1943 and I was in until November, 1945.

Q. November, 1945? A. That's right.

Q. Now, do you recollect having signed a partnership agreement, I will place it before you, that is Exhibit G. I will show you there a signature. Is that your signature? A. Yes, Mr. Carr.

Q. Who asked you to sign that?

A. My father. [57]

Q. Where did you receive that request?

A. I was still in Los Angeles when this partnership agreement was made—no—no. I was in the Navy, that's right.

Q. Well, how did you get it to sign it?

A. Through the mail.

Q. How did you get it?

(Testimony of Margaret Ferguson.)

A. Through the mail.

Q. Through the mail, and who sent it to you?

A. My father.

Q. And did you read the agreement?

A. I don't remember reading it.

Q. Did he request you to sign it, or what did he say to you?

A. He wrote—well, I really don't recall what he said. He undoubtedly sent me a letter with it telling me to sign the papers and return them.

Q. Where were you at that time, by the way?

A. Dayton, Ohio.

Q. And did you come home from time to time?

A. I had two leaves during the three year period.

Q. Now, at any time while you were on leave did you undertake to manage any of this—these partnership assets or do anything about them? [58]

A. No, sir.

Q. Were you consulted at any time by the other alleged partners to this agreement, to-wit: your stepmother, Mrs. Sherry, or Mr. Sherry, your father, or your brother? A. No.

Q. Until you returned here in November of 1945, did you ever attend a meeting with anyone in which you discussed the management of this Sherry Enterprises? A. No.

Q. Did you ever have any correspondence with your father about policy or management of Sherry Enterprises? A. No, sir.

(Testimony of Margaret Ferguson.)

Q. Do you recollect signing Exhibit—withdraw that.

Did you request anyone to make up a partnership return for Sherry Enterprises for 1945 or '46?

A. No, sir.

Q. Do you know who did? Did you ever get a copy of the partnership returns for those years?

A. No.

Q. Do you recollect ever having seen a copy of the partnership returns for the years, fiscal years 1945 and '46? I am talking about now up to the trial, not since that time.

A. Are you talking about income tax returns?

Q. Yes.

A. They were sent to me. [59]

Q. No, I am talking about the partnership returns. A. Oh, no, no.

Q. Do you ever remember seeing the partnership returns? A. No.

Q. Now, then, did you receive some individual returns for yourself? A. Yes.

Q. For those two years? A. Yes.

Q. And was that on a calendar year basis, do you know? A. No, I don't.

Q. Do you know what I mean by "calendar year"? A. No, not specifically.

Q. As distinguished from a fiscal year ending June 30th?

A. January to January, or June to June?

Q. January to December 31st would be your cal-

(Testimony of Margaret Ferguson.)

endar year. Was that the basis on which you reported your return?

A. I don't remember.

Q. Now, did you request anyone to prepare your individual returns for the year 1945 and the year 1946?

A. No.

Q. How did you receive them?

A. I received them through the mail.

Q. From whom?

A. From my father. [60]

Q. And did you go over them?

A. I remember looking at them. I didn't—

Q. I show you here, in the meantime, I now have the gift tax returns, Exhibits J and I, and I notice the signature here, do you remember signing as donee the gift tax returns?

A. I don't recall.

Q. Do you ever remember getting the gift tax returns?

A. No.

Q. Do you ever remember having a discussion at any time with anyone about the formation of the partnership?

A. Before it was formed?

Q. Yes.

A. No.

Q. Did your father ever mention to you before it was formed that he was forming a partnership?

A. No.

Q. The first notice, then, I take it, you got was when you got the partnership document from him asking you to sign it, is that right?

A. That's right.

Q. I show you here Exhibits I and J which

(Testimony of Margaret Ferguson.)

are the gift tax returns. I take it those are your signatures, aren't they? A. They are.

Q. Do you remember now where you signed those as donee? A. No. [61]

Q. You have no recollection? A. No.

Q. Do you remember whether your father asked you to do it or someone else?

A. My father would have asked me to do it.

Q. Do you remember ever having looked into those returns to see what they contained?

A. No.

Q. Now, I will show you next your income tax returns for the years '45 and '46. This is Exhibit A and Exhibit B. Exhibit A is for 1945, and let's see if this is your signature. Is that it?

A. That is it.

Q. Now, do you recollect going over that to check the figures?

A. No, I remember that I looked at them, but the figures didn't mean anything to me.

Q. From whom did you receive that?

A. From my father.

Q. By mail? A. Yes.

Q. And where were you at the time?

A. In Dayton, Ohio.

Q. Now, I show you Exhibit B and ask you the same [62] series of questions, first as to signature?

A. It is mine.

Q. Do you remember receiving that?

A. Yes.

Q. How? A. Through the mail.

(Testimony of Margaret Ferguson.)

Q. From whom? A. My father.

Q. Did you go—look into it to see if it was correct?

A. I would have had no way of knowing whether it was correct or not. No, I didn't.

Q. What did you do with those two, A and B? What did you do with these two exhibits?

A. I signed them and returned them.

Q. To whom? A. My father.

The Court: Where were you when you received Exhibit B?

The Witness: In Dayton, Ohio.

The Court: When were you mustered out of the Navy?

The Witness: November, 1945.

Mr. Carr: This is Exhibit A she was talking about, your Honor.

Q. (By Mr. Carr): Now, Exhibit B, I assume the Court wants to ask [63] you the same question.

The Court: I asked her about Exhibit B.

Mr. Carr: I am sorry.

The Witness: The date on this was what? February 6, 1947. In that case I would have been in Los Angeles.

Q. (By Mr. Carr): You were in Los Angeles at that time?

The Court: Are you guessing or testifying from your actual recollection?

The Witness: I was in Los Angeles in 1947.

The Court: Well, then, how did you receive Exhibit B?

(Testimony of Margaret Ferguson.)

The Witness: Then, it was undoubtedly given to me by my father at home. I got all the income tax returns——

The Court: Did you live with your father then?

The Witness: Yes.

Q. (By Mr. Carr): So, then, you got Exhibit A through the mail, you say?

A. Yes—well, there is no date on this one. If it was 1945, I must have gotten it through the mail.

Q. Well, it was for the calendar year 1945?

A. Yes, that's right. I received it through the mail.

Q. When did you get back to Los Angeles?

A. November, 1945.

Q. Isn't it a fact you have been here in Los Angeles in 1945? [64]

A. No, because it says on this income tax return I was in the United States Navy. I couldn't have been at home.

The Court: Do you know when Exhibit A was signed?

The Witness: Do I know the actual date that I signed it?

The Court: Suppose you look at the date that appears opposite your signature.

The Witness: March 8, 1946. Is that right? Is that the date on the return?

Mr. Carr: That is right. That is correct.

The Court: That doesn't seem to be the date that pertains to her signature. The one that per-

(Testimony of Margaret Ferguson.)

tains to *be* her signature is to the right of her signature.

The Witness: No, then, I would have been in Los Angeles 1946.

Q. (By Mr. Carr): That is what I am getting at. So, you were here when both of those were signed, weren't you? A. I——

Q. You were out of the Navy at that time?

A. I was in 1946.

Q. So, you were in error when you said you got those through the mail?

A. I did get some in the mail while I was in the Service. I thought these were the ones. [65]

Q. Did you ever get a copy of the partnership returns? A. Not that I recall.

Q. Did you get the partnership agreement through the mail? A. Yes.

Q. Now, are you sure about that, or did you sign that before you went away to the Service?

A. Well, the date on it is October, 1943, and I was in the Service in October, 1943.

Q. All right. Now, what, if anything, did you do to help manage this partnership when you came back from the Service? A. Nothing.

Q. Well, you say "nothing." Didn't you do some errands for your father?

A. Oh, of course.

Q. Did you go to the bank sometimes for him?

A. Yes.

Q. Did you go cash checks for him?

A. Sometimes.

(Testimony of Margaret Ferguson.)

Q. Weren't you on the—allowed to sign checks on the partnership? I am talking about Sherry Enterprises now. Couldn't you draw a check on that?

A. Yes. We had joint bank accounts, my father and I, which I assume were part of the Sherry Enterprises, Mr. Carr. [66]

Q. Did you draw checks on that to pay for anything?

A. Household expenses, yes.

Q. Whose household expenses?

A. My father's and mine, we lived together.

Q. Did you do any errands for him in connection with the partnership, Sherry Enterprises?

A. I'd make deposits for him.

Q. What else would you do?

A. That is about all.

Q. Now, did you have anything to do with setting the policy of the partnership, Sherry Enterprises? A. No.

Q. Did your father discuss with you the management or setting of policy of that partnership?

A. He would sometimes tell me what he was doing, but I had no opportunity to voice an opinion about it.

Q. Did you ever have, to your knowledge, a formal meeting which was attended by your brother, your father, and your stepmother to discuss matters of partnership?

A. A formal meeting? No.

Q. Well, maybe the word "formal" is a bad word. Did you have a meeting in which all four

(Testimony of Margaret Ferguson.)

of you sat down and discussed policy relating to the partnership?

A. The only times we ever discussed it with all members present would be at a dinner, something of that kind. [67]

Q. Were you asked for your opinion as to how to run the partnership, or how to operate it?

A. No.

Q. Never? A. No.

Q. Did your father ever at any time to your knowledge ask your stepmother for her opinion as to how to operate the partnership?

A. No, sir.

Q. Did he ever at any time ask you for an opinion as to what he should do, policy-wise or how he should manage that partnership?

A. No, sir.

Q. Did you ever hear him ask your brother, Newton Sherry, how or in what way he should proceed in connection with the partnership, Sherry Enterprises? A. No, sir.

Q. Did you ever volunteer at any time that you recollect an endeavor to tell your father how to operate that partnership? A. No, sir.

Q. Did you make any capital contribution yourself? You know what I mean by that, contribution of capital to this alleged partnership?

A. \$500.00.

Q. \$500.00. Where did you get the \$500.00? [68]

A. From my grandmother. It was from my grandmother's estate.

(Testimony of Margaret Ferguson.)

Q. Did you ever actually see the \$500.00?

A. Yes.

Q. In what form?

A. It came in a check, in the form of a check.

Q. Made out to you? A. Yes.

Q. And what did you do with the check?

A. I gave it to my father.

Q. Gave it to your father? A. Yes.

Q. What year was that?

A. Gee, Mr. Carr, it was after I came home from the Service, I think. I am not clear on it. It was some time after she died.

Q. That was long after the partnership had been formed, is that right? A. Oh, yes.

Q. And you gave the check, endorsed it over to your father? A. That's right.

Q. Do you know what he did with it?

A. He told me he was going to put it——

Q. I didn't ask you that. I asked you if you knew [69] what he did with it.

A. No.

Q. What did he say he did with it?

A. He said he was going to put it in the business.

Q. Did he say what business?

A. Well, I assumed when he said business——

Q. No, I am not asking you what you assumed. Did he say which business?

A. He said he was going to invest it in the business.

Q. But he didn't say which business?

(Testimony of Margaret Ferguson.)

A. No.

Q. Now, in connection with your brother, of your own knowledge I am asking now, did your brother in any way participate in operating or managing this partnership, Sherry Enterprises, as far as you know? A. No.

Q. What was your brother doing when you came home from the Service?

A. I think he was working at the Bayview Club.

Q. That is the one down in Wilmington?

A. Yes.

Q. Do you know whether or not that was a part of the partnership assets, Sherry Enterprises?

A. No.

The Court: You mean you don't know or that it was [70] not?

The Witness: No, I mean that——

Q. (By Mr. Carr): Do you know?

A. I know that it was a part of the S & P Company.

Q. S & P Company? A. Yes.

Q. How do you know that?

A. I was told all of the businesses were.

Q. When you say all of the businesses, what do you mean?

A. We will get confused, won't we? I mean all of the operating businesses, the bars and restaurants.

Q. Well, now, Mrs. Ferguson, were there some businesses that were not a part of S & P?

(Testimony of Margaret Ferguson.)

A. Not that I know of.

Q. Did you know whether or not Mr. Sherry had partnerships with other people besides Mr. Kalmanovitz? A. Not that I know of.

Q. Did you ever examine the partnership books?

A. No.

Q. Did you ever ask for an accounting of any kind? A. No.

Q. Did you ever receive any of the income from the partnership, Sherry Enterprises?

A. No, sir. [71]

Q. And did you ever yourself pay any taxes for income which you allegedly received from the partnership, Sherry Enterprises?

A. Well,—

Q. Do you understand the question?

A. No, I don't.

Q. Did you ever take any money out of your pocket and pay any taxes on income which you received from Sherry Enterprises? A. No.

Q. Did you ever receive any income from Sherry Enterprises? A. No.

Q. Now, when you returned from the Service, didn't you go to school for a while?

A. Yes, I did.

Q. Where did you go?

A. The University of Southern California.

Mr. Carr: I don't think this has been marked as an exhibit. I will show it to her. You want it introduced, counsel? It is a record out there at school. It is entirely up to you.

(Testimony of Margaret Ferguson.)

Mr. Townsend: I don't particularly.

Q. (By Mr. Carr): Can you refresh your recollection and tell me what [72] date the dates were?

A. The date entered was January 2, 1946—wait a minute, March 7, 1946.

Q. That is the date of entry?

A. That is the date of entry.

Q. When did you terminate?

A. I don't see it here, but I am sure it was in June when the school year was over.

Q. In 1946? A. Yes.

Mr. Carr: No further questions.

I have had it called to my attention that apparently she made an error. I think maybe I better offer this in evidence and ask her to look at it.

Look at the top and see what the date of entry is. If you look at the very top, I think you will find the date.

The Witness: January 2, 1946. Well, there are two different—yes, January 2, 1946.

Q. (By Mr. Carr): Now, have you got it straight?

The Court: You may look at that paper only for the purpose of refreshing your recollection. Your testimony must be based on your recollection and not what you read off the paper.

The Witness: Well, I remember that I went to school [73] as soon as I was able to go to school after I came home. In other words, I came home in November. I couldn't have gone to school in November. It was the middle of the school term. As soon

(Testimony of Margaret Ferguson.)

as I had the opportunity to go, I went and I don't remember the exact date.

Q. (By Mr. Carr): Can you approximate the date? A. I thought it was February.

Q. Of 1946?

The Court: Did you complete a full semester?

The Witness: Yes, I did.

Mr. Carr: I think that is all.

Cross Examination

Q. (By Mr. Townsend): Now, Mrs. Ferguson, directing your attention to Exhibit J which is a donee gift tax return of gifts, I believe you already identified that for Mr. Carr as bearing your signature. Is that correct?

A. Yes, that is correct.

Q. And I believe you stated you were in the Navy at the time you signed this?

A. Well, I have been so confused about dates, if you would tell me the date, I can tell you where I was.

Q. It bears the date of March 15, 1944.

A. Then I would have been in the Navy, yes.

Q. And do you recall receiving this in the mail?

A. No, I don't recall. I am sure I did, but I don't recall.

Q. Do you recall that you were told by letter or otherwise that your father and stepmother were making this gift to you?

A. I would only have been told to sign the papers and return them.

(Testimony of Margaret Ferguson.)

Q. Wouldn't they give some explanation to you?

A. Probably not.

Q. Now, when you got the partnership agreement in the mail didn't the letter that they sent you say something about they were forming a partnership and wanted to take care of you in the future?

A. I honestly can't tell you what the letter said. I have no recollection about it. I am only assuming that a letter came with it.

Q. I see, but you do recall signing that partnership agreement, do you not?

A. Yes, it is my signature.

Q. Did you look at it?

A. Not that I recall.

Q. You don't recall whether you did or did not?

A. That's right.

Q. Well, when did you first become aware, as far as [75] your recollection is concerned, of there being a partnership?

A. I am not sure of the dates. It could possibly have been at some time when I was home from the Navy. Perhaps on a leave that I was told about it.

Q. Directing your attention, Mrs. Ferguson, to Exhibit H which purports to be an agreement amending the original partnership agreement—

Mr. Carr: I have a copy, counsel.

Mr. Townsend: Thank you, that would be very helpful.

Mr. Carr: It is really a duplicate original so if I may, I'd like to have that back.

(Testimony of Margaret Ferguson.)

Mr. Townsend: Surely, I am just going to use it for the witness.

Q. (By Mr. Townsend): This is an agreement purportedly amending the original partnership agreement. This agreement is dated the 1st day of July, 1944, and I believe that bears your signature, does it not?

A. I am not sure that this is my signature. I don't think it is.

Mr. Carr: I didn't hear the answer.

The Witness: I don't think it is. My father had power of attorney. I don't know whether that is my signature or not.

Mr. Townsend: Well, it is in evidence. [76]

Mr. Carr: You have one in evidence already.

Mr. Townsend: Yes.

The Court: The stipulation, I think, states it was signed.

Mr. Carr: That is correct. We thought she did, your Honor. That was our understanding when we stipulated to it, so this comes as a surprise to me, too. I assume all stipulations are subject to the light of truth, so I guess the testimony ought to stand. I submit it should. May I just ask one question, your Honor, of her? Do you mind at this time, counsel?

Mr. Townsend: No, go ahead.

Voir Dire Examination

Q. (By Mr. Carr): Are you in doubt about the signature?

(Testimony of Margaret Ferguson.)

A. I am in doubt about it. I don't know what difference it makes, but it doesn't look like my signature.

Mr. Townsend: I think there are enough other signatures in the records, Mr. Carr.

The Court: It looks similar to the other signatures.

Mr. Carr: It does. We thought it was the same.

The Court: The opening paragraph of the stipulation of facts recites a stipulation that the facts shall be taken as true without prejudice to the right of either party to submit material and competent evidence of any other facts not [77] inconsistent herewith, and I do not believe I will receive any evidence in contradiction to the stipulation.

Mr. Carr: Well, I really don't think it is of great moment, your Honor, in the case. I won't urge the point. This comes as a little bit of a surprise to me. We thought it was settled.

Cross Examination—(Continued)

Q. (By Mr. Townsend): What did you understand when you signed this partnership agreement, Mrs. Ferguson? That would be Exhibit G which was sent to you in the mail with the letter.

A. What did I—I don't understand your question.

Q. What did you understand you were signing when you signed this instrument?

A. I don't recall.

Mr. Carr: Are you talking about the exhibit?

(Testimony of Margaret Ferguson.)

Mr. Townsend: Exhibit G, Mr. Carr.

Mr. Carr: He is talking about Exhibit G.

The Witness: Yes, I understand that. I don't remember what I thought about it. It was a long time ago.

Q. (By Mr. Townsend): And is your testimony the same with respect to your signing the gift tax returns?

A. You mean that I don't remember what I thought about it at the time? [78]

Q. Yes. A. Yes, that's right.

Q. You knew, did you not, that that return would be filed with the government at the time you signed it? A. Yes.

Q. You felt that that was a true statement? Did you have any reason to believe that this was a sham gift or not a true gift?

A. Of course not.

Q. What assets did you contribute to the Sherry Enterprises? A. Of my own?

Q. Yes.

A. The \$500.00 that was from my grandmother.

Q. How about the money that was left by your mother, Mrs. Sherry?

A. That was supposed to have been put in as a contribution.

Q. That was your understanding?

A. That was my understanding.

Q. Your father held that money for you?

A. That's right.

Q. You knew it was your money?

(Testimony of Margaret Ferguson.)

A. I knew it had been left for my brother and I.

The Court: How much did that come to? [79]

The Witness: My father told me that it was \$20,000.00.

Mr. Carr: Well, I submit, I believe your Honor will point it out, that you aren't going to consider hearsay evidence, and I think all this apparently is hearsay.

Q. (By Mr. Townsend): Your mother also told you, did she not, that she was leaving you \$20,000?

A. Yes, she did. She told me that there was that much money that would be ours if anything happened to her.

Q. It was your understanding that that money was contributed to the Sherry Enterprises?

A. That was what I was told, yes.

Q. Now, when you came out of the Navy, that would be in November or earlier than that in 1945——

A. November, 1945.

Q. What did you do exactly?

A. Well, I went to school until the following June.

Q. That was in Los Angeles?

A. University of Southern California.

Q. University of Southern California. Did you work in any way during that period?

A. Not during that period, no.

Q. When did you start working and what did you do, please?

A. Well, I started—I worked for a while in Sherry [80] Dunn, which was a perfume business,

(Testimony of Margaret Ferguson.)

for my father and I don't remember the exact period. It couldn't have been too long, perhaps from September or October. I was married in March. So, there was a period of just a few months.

Q. What did you do for the Sherry Dunn Company?

A. Answered telephones and took messages and things of that kind.

Q. Was it your understanding that Sherry Dunn Company was a part of Sherry Enterprises?

A. Yes, that was my understanding.

Q. You knew that title to real property was being placed in your name during that period, Mrs. Ferguson, did you not? A. Yes, I did.

Q. Was that your own property?

A. No, it was the——

Mr. Carr: Now, I submit that we have no property identified. I don't know whether the witness knows what you are talking about.

Mr. Townsend: Well, she appeared to.

Mr. Carr: Well, I think the property ought to be identified.

Q. (By Mr. Townsend): Well, what property was placed in your name, Mrs. Ferguson?

A. Well, as I recall, there was some lots on Santa [81] Monica Boulevard, and there was a building—no, I don't think that was in my name. I think that was the Marton Holding Company, if I recall correctly.

Q. Mrs. Ferguson, my information is that real estate in the value of \$2,500.00 was placed in your

(Testimony of Margaret Ferguson.)

name on June 30, 1946, and that real estate to the value of \$52,500.00 was placed in your name on June 30, 1945. That would be the property, I believe, of the Marton Holding Company. Do you recall that?

A. I just stated it. What do you mean, do I recall what? Do I recall what?

Q. Do you recall title to that property being placed in your name?

A. Yes, I just told you that I did.

Q. Now, was that your own property?

A. It was a part of the Sherry Enterprises.

Q. What would you roughly estimate would be the total value of the assets that you owned personally in the years 1945 and 1946?

A. I never considered that I owned any assets personally. They were all a part of the Sherry Enterprises.

Q. Now, did you ever hear of the Marton Holding Company? A. Yes.

Q. What was your connection with that company?

A. Well, there were three partners in it, I think, my brother, and Mr. Rogers, and myself, as I recall. It was a [82] company my father set up. As he told us at the time, he was always worried about protecting our interest and protecting us, and this was the reason that he put this property in our name, or at least that was my understanding at the time it was done.

(Testimony of Margaret Ferguson.)

Q. Did you consider that to be your own property? A. No.

Q. Whose property did you consider it to be?

A. Well, it was a part of the Enterprises. It was really my father's.

Q. During the years 1945 and 1946, as far as your own thinking was concerned, Mrs. Ferguson, did you feel that you were a bonafide member of a partnership, namely, the Sherry Enterprises?

A. At that time I did. Well, I understand the word "partnership" is in contention here, but for all practical purposes, I felt that I was, yes.

The Court: When did your father die?

The Witness: He died the end of May, three years ago.

The Court: Did he still have an interest in Sherry Enterprises at the time of his death?

The Witness: Oh, yes.

The Court: What happened?

The Witness: You mean what happened to the partnership since then?

The Court: Your father's interest in it. [83]

The Witness: Well, there was practically nothing *let* to it at the time he died. I don't quite—there is an estate, so much of this was depleted by the time he died. That is what I am trying to say.

Mr. Carr: May I suggest something, your Honor, that you might ask her what the assets were in the estate. I think the estate is still pending, isn't it?

The Witness: Yes.

Mr. Carr: Tell the Judge.

(Testimony of Margaret Ferguson.)

The Court: I will let counsel bring that out. I am just puzzled by the consequences at his death, whether it was owned one way or whether those interested in it proceeded upon the assumption that it was split four ways, and I think there would be different probate or legal proceedings after his death, depending upon which theory were adopted. I just wondered what, in fact, has happened since his death.

Mr. Carr: I think I can help clarify, if you are in disagreement, you can assert so.

The Court: I don't want to interrupt Mr. Townsend.

Mr. Townsend: It is all right.

Mr. Carr: As far as I know, of course I don't represent the estate. The estate—I did represent Mr. Sherry and his wife in the tax proceedings, but another lawyer intervened and after Mr. Sherry's death, she withdrew and went on her own and went by default in the tax proceedings in other [84] cases, so there was a default and no petition was filed, but in the meantime, I am told that the estate turned out to have nothing in it, that it was defunct.

Mr. Townsend: That is my understanding.

Mr. Carr: That it had been dissipated or something had happened to it prior to his death.

The Court: That Sherry Enterprises had no value at that time?

Mr. Townsend: The estate had no value, at least

(Testimony of Margaret Ferguson.)

listed in the name of the estate, had no assets listed in the estate.

The Court: Even on the government's theory, Mr. Sherry would have had a quarter interest in Sherry Enterprises and on the petitioner's theory, he would have had a complete interest in it. My question is what happened to Sherry Enterprises?

Mr. Townsend: That is the tax proceeding that Mr. Carr was talking about where a 90-day letter was sent to Mr. Sherry based on the theory that he was a 25 percent partner, and he defaulted.

Mr. Carr: The deceased's estate defaulted, and the wife also defaulted, I understand. I represented her, but she didn't see fit to have me file a petition.

The Court: Was it on the theory that he had a quarter interest? [85]

Mr. Townsend: A quarter interest, your Honor.

The Court: Did the government take any position at all to protect itself in the event that it were wrong in its theory in this case?

Mr. Townsend: It did not.

The Court: It didn't seek to collect or to propose a deficiency based on the theory that he owned it all?

Mr. Townsend: No, it did not.

Mr. Carr: Well, from a practical standpoint, it turns out the same. We are fighting over a dead turnip, your Honor. That is what it amounts to.

Q. (By Mr. Townsend): Now, Mrs. Ferguson, you had some relation with the Marguery Corporation, did you not? A. Yes.

(Testimony of Margaret Ferguson.)

Q. What was your connection with that?

A. It was—I was at one time the president of the corporation.

Q. You were also a stockholder in that corporation?
A. That's right.

Q. Are you still today?
A. Yes, I am.

Q. Are you still president of that corporation today?
A. No, I am not.

Q. But you are still a stockholder? [86]

A. That's right.

Q. How did you acquire your stock in that corporation?

A. Well, it was given to me by my father.

Q. When?
A. 1947.

Q. In 1947?
A. Yes.

Q. Is that the corporation that ran Lucy's Restaurant?
A. Still does, yes.

Q. And you have worked also at Lucy's Restaurant, did you not?
A. I still do.

Q. You still work there at Lucy's?

A. Yes.

Q. And what is your position at Lucy's today?

A. Well, I am managing the restaurant today.

Q. You are managing it?

A. That's right.

Q. And Lucy's is owned by the Marguery Corporation?
A. That is right.

Q. And you acquired your stock in Marguery Corporation from your father back in 1947?

A. That is right.

(Testimony of Margaret Ferguson.)

Q. Did you consider that stock to be your own stock at the time it was given to you? [87]

A. Yes.

Q. You did not consider it to be a part of Sherry Enterprises?

A. No, I considered—I really considered it to be my stock.

Q. To be your own stock? A. Yes.

The Court: Where did it come from?

The Witness: My father.

The Court: Well, did you know whether or not it had been a part of Sherry Enterprises at any time?

The Witness: No.

The Court: You mean you don't know, or you know it was not?

The Witness: Well, if I recall correctly, I got the stock at the time that he bought the restaurant. The stock that—yes, that's right.

The Court: You got it at the time you bought it?

The Witness: Yes.

Q. (By Mr. Townsend): Do you know that he used funds of Sherry Enterprises in order to buy it? A. Yes, I think he did.

Q. Now, Mrs. Ferguson, you are presently the owner of a fourplex apartment house at 647 North Irving Boulevard, [88] Los Angeles, are you not?

A. That is right.

Q. How did you acquire that property?

A. From my father.

Q. When?

(Testimony of Margaret Ferguson.)

A. I don't remember exactly. It was several years ago.

Q. Was that property also held for Sherry Enterprises before it was turned over to you?

A. I can't tell you that. I don't recall.

Q. Did you consider yourself the owner of that property at the time you received it, or did you consider that you held it for Sherry Enterprises?

A. Well, I consider myself the owner.

The Court: Did you file any donee gift tax return to show that it was given?

The Witness: Did I?

The Court: Yes.

The Witness: No.

Q. (By Mr. Townsend): What funds were used to acquire that apartment house?

A. I don't know.

Q. You don't know? A. No.

Q. Do you know whether or not it was Sherry Enterprises' funds? [89]

A. No, I don't. It was a very complicated transaction as I recall, and I am not sure where the funds came from to buy it.

Q. Do you recall anything about a transfer of lots back and forth to acquire that property?

A. No.

Q. La Cienega lots?

A. No, to buy that property? No.

Q. What other property do you own today which you acquired from your father or from the Sherry Enterprises?

(Testimony of Margaret Ferguson.)

A. I have a house at 1810 Courtney Avenue which was bought—was a part of the Sherry Enterprises.

Q. When did you acquire that property?

A. 1950.

Q. In 1950? A. Yes.

Q. And title is in your name?

A. That's right.

Q. Do you consider that to be your own property?

A. Well, let me state it this way. I do. I have made the mortgage payments on it, and I am still making the mortgage payments on it.

Q. But at one time it was an asset of Sherry Enterprises? A. That's right.

Q. What would you say the approximate value of that [90] home would be?

A. Oh, probably \$35,000.00. It is a triplex. It is not just a home.

Q. I see, but that is in addition to the other apartment house we are talking about?

A. Yes.

Q. What would you say the approximate value of that fourplex apartment house on Irving Boulevard is?

A. It is a very old building, maybe \$14,000.00, something like that.

Q. What would you say approximately is the value of the stock in Marguery Corporation which you hold?

A. It is not worth a thing.

(Testimony of Margaret Ferguson.)

Mr. Carr: Talk louder, we can't hear you.

The Witness: I don't think it is worth anything, Mr. Carr. It is a very shaky business.

Q. (By Mr. Townsend): You do not think that Lucy's Restaurant is worth anything?

A. Well, let me say that we haven't been able to sell it for anything.

Q. But it is presently operating as a business?

A. That's right.

Q. Now, are there any other assets besides that you have acquired from your father or from Sherry Enterprises? [91]

A. No.

Q. How about lots on La Cienega? Didn't you at one time hold some lots on La Cienega?

A. I never recall holding—my father had lots on La Cienega, but not me. They were in my father's name as I recall.

Q. Mrs. Ferguson, I show you what has been marked for identification as Respondent's Exhibit L which purports to be a waiver of restrictions on the assessment and collection of deficiency income tax. In other words, you are agreeing to an additional deficiency of \$1109.75. Attached thereto is a revenue agent's report which was sent to you at 5444 Melrose Avenue. The date is September 9, 1948, and this additional assessment is purportedly to increasing your distribution of share of income from the Sherry Enterprises as partnership. Is that your signature thereon?

A. Yes.

Q. Do you recall signing that?

A. No—when was this sent? When was this—

(Testimony of Margaret Ferguson.)

Q. The next page will show you an address.

A. I lived out of the city for a while after I was married. No, I think I was home at this time, but I don't recall signing this.

Q. You don't recall anything about it?

A. No. [92]

Q. Would you look through it and see if you can recall anything about it, Mrs. Ferguson?

A. No, all of these things were presented to me to sign, and I never knew. I took them to be correct and I signed them.

Q. Did you realize when you signed that that you were agreeing to a tax of \$1100.00?

A. Probably not.

Q. Now, Mrs. Ferguson, I believe Mr. Carr asked you this, but I wanted to ask you again.

Were there ever business meetings between the four members of the family, and on this purported partnership which you attended? It wouldn't have to be a formal meeting.

A. There were discussions at different times, and very few, maybe two or three where all the members of the family would be present. This would be at a social gathering where this discussion might come up. There were never any formal meetings or you know, calls to discuss business, that sort of thing.

Q. Did you ever discuss the acquisition of new businesses or how business was going on or things like that at these meetings?

A. Mostly they were meetings, and my father

(Testimony of Margaret Ferguson.)

would say I bought or sold, and we'd sit there and shake our heads, and that was about the extent of it.

Q. Sounds like something my family would do, also. [93] You spoke about your brother, Newton, working for Bayview——

A. I think it was the Bayview Club, if I am not mistaken. I know Bayview was in the name.

Q. And who did you understand he was actually working for then?

A. He was working for the S & P Company. At least, that was my understanding.

Q. Which, in turn, you understood to be an asset of the Sherry Enterprises?

A. Half of it.

Q. Half of it? A. Yes.

The Clerk: M for identification.

Mr. Carr: That is a copy of the statement? We have a copy of it.

(The document above-referred to was marked

Respondent's Exhibit M for identification.)

Q. (By Mr. Townsend): Now, Mrs. Ferguson, I show you what has been marked for identification as Respondent's Exhibit M and which purports to be the voluntary sworn statement of Mrs. Margaret Ferguson given to the Office of the Intelligence Unit, Bureau of Internal Revenue in this building on May 15, 1950.

A. I remember it well.

Q. You remember that? [94] A. Yes.

Q. Do you recall or can you tell me if that is

(Testimony of Margaret Ferguson.)

your signature thereon? A. Yes, it is.

Q. And would you read that paragraph just above your signature, please? Would you read it aloud, please?

A. "I have carefully read the foregoing transcript of my statement, Pages 1 to 30, and I hereby certify to the best of my knowledge and belief it is a true and correct transcript of my answers to the questions therein propounded."

Q. Would you just glance through each page, Mrs. Ferguson, and see if each page bears your initials?

Mr. Carr: I think that we will stipulate that it does, counsel. I am sure it is the same statement I am talking about. Is this the one?

Mr. Townsend: Yes, it is.

Mr. Carr: Well, we won't require you to prove it.

Mr. Townsend: Respondent offers in evidence the document just identified by this witness.

Mr. Carr: Objected to on the ground it is not proper impeachment. It is hearsay. No proper foundation has been laid. It has no evidentiary value whatsoever. The only purpose for which it can be used is to impeach.

Mr. Townsend: Your Honor, it is offered as admissions of this witness. [95]

The Court: Overruled. It will be admitted.

The Clerk: M.

(The document heretofore marked Respondent's Exhibit M was received in evidence.)

Mr. Townsend: No further questions.

(Testimony of Margaret Ferguson.)

Mr. Carr: May I ask a few more?

Redirect Examination

Q. (By Mr. Carr): Mrs. Ferguson, you say you felt in answer to counsel that there was a partnership. Will you be more explicit? What do you mean by "you felt there was a partnership"?

A. My father told me there was a partnership.

Q. Well, is that the extent of what you based your conclusion on, the fact that he told you there was a partnership? A. Yes.

Q. Now, you say that you are a stockholder in the Marguery Corporation and that was given to you in 1947. What percent of the stock?

A. I don't recall.

Q. What percent do you actually have now?

A. Twenty.

Q. Was that what was given to you?

A. No. No, there were changes made in the stock, Mr. Carr, from the time it was given until the present time. [96]

Q. Well, at the present time you hold 20 percent in the stock? A. That's right.

Q. Now, the corporation, does it own the building? A. No.

Q. Has a lease? A. That's right.

Q. How long a lease?

A. Well, there is an option that expires May 1st and——

Q. What year?

A. This year. This May 1st.

(Testimony of Margaret Ferguson.)

Q. And are you making—have you any net profits there now? A. No.

Q. Is the business winning or losing?

A. Well, it is barely breaking even.

Q. And when you say that the stock that you own is worth nothing, do you actually mean that?

A. Yes, I actually mean that.

Q. Have you tried to sell it?

A. We have even tried to sell the business, let alone the stock, and haven't been successful.

Q. Now, this property, 647 North Irving Boulevard, that was in the name of someone else for some period of time, wasn't it? [97] A. Yes.

Q. Who? A. Albert Levine.

Q. And who is Albert Levine?

A. He was an attorney for my father.

Q. And do you recollect how that property was gotten out of his name?

A. By lawsuit, I recall.

Q. By whom? A. By you.

Q. Well, I mean who was the party plaintiff, do you remember?

A. By me, you mean—oh, excuse me, yes.

Q. And you recollect that we filed a suit in the Federal Court and finally got the property back?

A. That's right.

Q. Now, then, you might also tell the Court that I have a lien on that property. We don't want to keep anything from the Court.

A. That is right.

Q. Is that correct? A. Yes.

(Testimony of Margaret Ferguson.)

Q. In writing? A. Yes.

Q. And have had since before you got it in your name, [98] is that correct?

A. That is right.

Q. At the time it was in Mr. Levine's name, I took a written assignment of that property from yourself, your mother, your father and your brother, is that correct?

A. That is correct.

Q. And still have it as of record?

A. That's right.

Q. So, you have no hopes of ever getting that property back, do you? A. No.

Q. Now, the property, the 1810 Courtney Avenue—incidentally, you might tell the Court who defended your father in the criminal tax case.

A. You did.

Q. And I take it I have represented you and your brother and your family until your mother pulled out over the years since that time. You remember when the criminal trial was?

A. About five years, in August, as I recall.

Q. 1952, wasn't it? This property on Courtney Avenue, you say, that is a triplex?

A. That's right.

Q. Who lives there?

A. My stepmother lives in one unit and I live in one, and we rent the third. [99]

Q. Incidentally, have you ever received anything from the probate of the estate?

A. No.

(Testimony of Margaret Ferguson.)

Q. Has anyone in the family; your stepmother, your brother, or yourself? A. No.

Q. To your knowledge, were there any assets in the estate? A. No.

Q. Do you know what happened to the assets of the partnership, Sherry Enterprises?

A. No. I didn't know there were any. This is a very confused——

Q. You knew, Mrs. Ferguson, that the partnership owned or had leases on various restaurants here in town at one time, is that right?

A. Sherry Enterprises?

Q. Yes, through S & P Company?

A. Oh, yes.

Q. Do you know what happened to those enterprises? A. No.

Q. Are they still in business?

A. The restaurants and bars and things like that?

Q. Yes.

A. Yes, I don't know what happened to them.

Q. Do you have anything to do with them?

A. No.

Q. Well, what happened to them, if you know?

A. Well, I remember—when Mr. Kalmanovitz and Mr. Sherry split their partnership, I think that they were all gone and we didn't have anything after that. As I recall, Mr. Kalmanovitz——

Q. I will read the list off the income tax returns. I am referring now to Exhibit I which is the gift tax return of Nathan Sherry, and he lists the fol-

(Testimony of Margaret Ferguson.)

lowing: He says, "In each of the two above named donees I have transferred an interest in the properties herein described and in the properties and values specified. Date of all gifts." Now, Item 1—6.25 interest in S & P Company, a co-partnership, what happened to the S & P Company?

A. It has been dissolved.

Q. Jerry's Joint, 211 Ferguson Alley, what happened to it, do you know?

A. Yes, the city tore it down.

Q. Well, did you get any money from it?

A. No.

Q. Who got the money?

A. I don't know.

Q. Hatfield's Cafe at 8108 South Central Avenue. What happened to that? [101]

A. I don't know.

Q. Did you get any money from it?

A. No.

Q. Hatfield's Cafe, 9301 South Vermont, what happened to that? A. I don't know.

Q. Royal Cafe at 10425 South Vermont Avenue in Los Angeles. Who got that? Do you know who owns that? A. No.

Q. Now, despite my eyes, I see it is the Pigpen Cafe. Do you know what happened to that?

A. No.

Q. Do you know who owns it? A. No.

Q. Did you get any money out of it?

A. No.

Q. Then, the Hollywood Recreation Center at

(Testimony of Margaret Ferguson.)

1513 North Vine Street. Do you have any interest in that? A. No.

Q. Do you know who owns it? A. No.

Q. Do you know what happened to it?

A. No.

Q. The Keith Jones at 727 South Hill Street. Do you own that? [102] A. No.

Q. Do you know who does own it?

A. No.

Q. What happened to it?

A. I don't know.

Q. The Jade Cafe at 6619 Hollywood Boulevard, what happened to that? A. I don't know.

Q. Did you ever have any interest in it that you know of? A. No.

Q. Did you ever receive any income from it?

A. No.

Q. The Stardust Cafe at 6645 Hollywood Boulevard, what happened to that?

A. I don't know.

Q. You don't know who owns it or what happened to it? A. No.

Q. And the Monticello Cafe, did you ever hear of that? A. Yes, I heard of it.

Q. What happened to it?

A. I don't know.

Q. Did you get anything out of it?

A. No.

Q. Do you know who owns it now?

A. No. [103]

(Testimony of Margaret Ferguson.)

Q. And the Pago Cafe at 5813 York Boulevard, who got that? A. I don't know.

Q. Did you get anything out of it?

A. No.

Q. Do you know who owns it now?

A. No.

Q. Jerry's Joint on Wilshire Boulevard, what happened to that? A. I don't know.

Q. Do you know who owns it? A. No.

Q. And now a night club called the Swing Club, do you know anything about that? A. No.

Q. Did you ever hear of that club?

A. No, I never heard of the Swing Club.

Q. Did you know whether it was a partnership asset or not? A. No.

Q. Can you tell me now what the partnership assets were of Sherry Enterprises in 1945?

A. No.

Q. The properties? A. No. [104]

Q. Can you name any of them?

A. In 1945? No.

Q. Well, did he have Lucy's at that time, do you know? A. No.

Q. And as far as you know, then, as I understand it, you don't know what properties were owned by Sherry Enterprises in the calendar year 1945? A. That is right.

Q. How about the year 1944? A. No.

Q. When did you first learn something about the properties that were owned by Sherry Enterprises, approximately?

(Testimony of Margaret Ferguson.)

A. The first thing I ever knew about it was when he bought the building in Pasadena, as I recall.

Q. Now, then, one or two other questions and then I am finished.

The \$20,000.00 that you said you understood came from your mother's estate, you never saw the twenty thousand, did you? A. No.

Q. Did you ever see any kind of paper to show a deposit for the \$20,000.00?

A. I was only 14 years old, Mr. Carr.

Q. And who told you there was \$20,000.00?

A. My father. [105]

Q. Do you remember where he told you that?

A. No.

Q. Do you know where the estate was probated?

A. No.

Q. And do you know in what form it was put into this partnership? A. No.

Q. Where was it kept through those years until the time it was put in the partnership, if you know? A. I don't know.

Q. Were you told where it was kept?

A. No.

Q. Did you know of any bank account where this twenty thousand was kept? A. No.

Q. What year would you say it was that your grandmother passed on and left this \$20,000.00?

The Court: It was her mother, was it not?

Q. (By Mr. Carr): I mean your mother.

(Testimony of Margaret Ferguson.)

A. My mother died February 1st, 1947—excuse me, 1937.

Q. The partnership was formed, as you know, in 1943, that is, the papers were executed. Now, during those years, you don't know where the twenty thousand was kept?

A. No, sir. [106]

Q. Mr. Sherry never told you that?

A. No.

Q. How old are you now?

A. Thirty-four.

Q. And when you signed this partnership agreement in 1943, how old were you?

A. I must have been 20 or 21.

Q. Well, how old were you?

A. Well, when in 1943.

Q. What is your birthday?

A. November 28th.

Q. You signed this partnership——

A. I was 20.

Q. Going on 21? A. Yes, that's right.

Q. Did you and your brother ever sit down and discuss why you weren't getting anything out of this partnership? A. No.

Q. Did you ever ask your father why you were not receiving anything out of this partnership?

A. No.

Q. Did you ever ask your stepmother why you weren't getting something out of the partnership?

A. No.

Q. Did you ever hear your stepmother try to

(Testimony of Margaret Ferguson.)

tell your [107] father what to do in this partnership? A. No.

Q. Were you ever around when she attempted to ask questions about it?

A. No, she never did, not to my knowledge.

Q. Did she ever come over to Lucy's?

A. Oh, yes, to eat, you mean?

Q. Well, I mean for business purposes?

A. Oh, no.

Q. What purposes did she come over there?

A. Social.

Q. What do you mean by "social"?

A. To eat.

Mr. Carr: No further questions.

Recross Examination

Q. (By Mr. Townsend): Mrs. Ferguson, you know that the S & P Company was originally a partnership between your father and Mr. Kalmanovitz, is that correct?

A. That is correct.

Q. And you know that that was later changed into a corporation, don't you, or purported—

A. To tell the truth, I heard it for the first time here today.

Q. You knew that your father and Mr. Kalmanovitz were [108] having some business difficulties? A. Yes.

Q. And you know that they decided to sever their business relationships? A. Yes.

Q. And you know that your father got out of

(Testimony of Margaret Ferguson.)

S & P Company and got something for his interest, didn't he? A. Yes.

Q. So, in other words, your father turned over all these clubs that we were talking about to Mr. Kalmanovitz and in return for that your father got the Clover Club and lots on La Cienega Boulevard. You know that?

A. Yes, that's right.

Q. What happened to those lots and what happened to the Clover Club?

A. The Clover Club burned down, and the lots he sold.

Q. And how about the lot that the—or the property that the Clover Club was on?

A. I think he sold them. He must have because we don't have them.

Q. Now, directing your attention to Exhibits A and B which are copies of your income tax returns, are they in front of you? A. Yes.

Q. You recall signing those returns, don't you?

A. My signature is on them. I don't recall signing them.

Q. One was signed on March 13, 1946, and the other one was signed some time in—in—apparently prior to March 15th of '47, right around that period? A. Yes.

Q. Now, those returns show that you had a net income for the year 1945 of some \$21,949.00. For the year 1946 they show that you reported a net income of \$19,156.85. Is it your testimony that you never even looked at those figures, that you didn't

(Testimony of Margaret Ferguson.)

know what you were doing when you signed these returns?

A. I didn't say I didn't look at the figures. Undoubtedly I did look at the figures. They had no meaning to me.

Q. Weren't you curious as to how you were reporting an income of nineteen thousand, and twenty-one thousand?

A. No, I assumed that this was income that had to do with my father's business, and that these returns were correct.

Q. In other words, when you filed these returns you felt that you were a partner and you were reporting your right share to the partnership income?

A. When I signed these returns, I thought that my father had prepared them, that they were correct and I would sign them. I don't know that I had any feelings about being [110] anything.

Q. Well, did you consider that this so-called "partnership" was a tax avoidance scheme that you were entering into with your father, your stepmother and your brother so that your father would be able to save Federal income taxes?

A. You want to know what I thought? My father and stepmother didn't get along very well. I was told that this partnership was set up to protect us in case of my father's death. That was the only reason completely.

The Court: By protection, you mean in the event

(Testimony of Margaret Ferguson.)

of your father's death you would have a certain percentage of this property? It would be yours?

The Witness: That's right.

Q. (By Mr. Townsend): Now, was there any conversation at any time with your father or any of the other members of the family that would indicate that this partnership agreement was a sham and was unreal? A. No.

Q. So far as you were concerned, when you went into this partnership you considered it a bonafide, genuine partnership?

A. For as much as I knew of it at the time, yes. I mean yes, that's right.

Q. And you felt when you executed these documents that [111] you were entering into a genuine partnership as far as you were concerned?

A. A family partnership, yes.

Q. Now, we discussed Lucy's Restaurant very briefly. Doesn't Lucy's Restaurant have certain substantial assets itself?

A. I wish you could find them.

Q. Don't they——

A. We have two liquor licenses, yes.

Q. Do they own the building, or is it leased?

A. No, the building is leased.

Q. And they have equipment in the building?

A. Very antiquated.

Q. How large a restaurant is it?

A. It is quite a large restaurant. It seats about 300 people.

Mr. Townsend: I have no further questions.

(Testimony of Margaret Ferguson.)

Redirect Examination

Q. (By Mr. Carr): Oh, yes, I wanted to ask the one question. Counsel asked you about the sale of some lots and about the money from the Clover Club. Did you get any of the money?

A. No.

Q. Did your brother get any that you know of?

A. No.

Q. You don't know what happened to the money? [112]

A. No.

Mr. Carr: That is all.

Mr. Townsend: That is all.

Mr. Carr: Mr. Kalmanovitz.

Whereupon,

PAUL KALMANOVITZ

called as a witness by and on behalf of the Petitioners, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Carr): Will you please state and spell your name?

A. Paul Kalmanovitz, K-a-l-m-a-n-o-v-i-t-z.

The Clerk:—m-a-n-o—

The Witness: —v-i-t-z.

Q. (By Mr. Carr): Your address?

A. 15001 Vanowen, Tarzana.

Q. You go under the name Mr. Paul now, don't you?

A. Short.

Q. I don't mean any implication, but that is the name you use?

A. That is right.

(Testimony of Paul Kalmanovitz.)

Q. You were at one time a partner with a man by the name of Nathan Sherry? [113]

A. I was.

Q. When did it begin?

A. Originally was Olympic Corporation, Nathan Sherry in December, 1940. Subsequent—

Q. Did you develop then into a partnership called S & P? A. That is correct.

Q. About when did that partnership start, Mr. Paul?

A. Oh, early part in the '40's, '41 or '42.

Q. And who were the partners?

A. Nathan Sherry and myself.

Q. And did you ever hear of a partnership being formed by the name of Sherry Enterprises?

A. During the trial, 1951 or so.

Q. Prior to that time, prior to the trial, you are referring now to the criminal trial of Mr. Sherry?

A. That is right.

Q. Prior to that time did you ever hear of the partnership Sherry Enterprises?

A. I think I have slight recollection. Mr. Hughes told me once.

Q. Do you remember about when that was?

A. '47, '48.

Q. Now, can you very quickly tell me to the best of your recollection, I realize you may not remember them all, [114] give me the names of the cafes or properties that were in the S & P Company in 1944 and '45? A. Oh, yes.

Q. Give them to us, will you, please?

(Testimony of Paul Kalmanovitz.)

A. We had Jerry's Joint downtown, Keith Jones, Pago, Monticello, Hollywood Recreation, Jade, Stardust, Clover Club, Monticello, Pigpen, Hatfield, 8001 South Central, Five and Ten. We had some in San Francisco, in Oakland, and Lake Shore Lounge, and some in Pasadena for a while.

Q. Now, were they owned by the S & P Company, a partnership? A. Yes.

Q. And who were the partners at that time?

A. Nathan Sherry, and myself, with the exception for a while we had other partners, three Lyon Brothers. We had a partner out in San Francisco, gentleman named Marquette, and Lou Rab.

Q. To your knowledge, were the two children of Sherry participating in any way in the operation of those businesses, any of them that you have named during the years '44 or '45?

A. With one exception, I believe Sherry Junior was working for a time being as a bartender in Bayview for a few months.

Q. You mean Newton Sherry?

A. Newton Sherry was employed when he came back from [115] the Service for a few months as a bartender in Bayview.

Q. Were you ever notified that the Sherry Enterprises owned any part of S & P Company?

A. No.

Q. Did anyone ever sit down in a meeting and represent Sherry Enterprises when you were discussing partnership matters?

(Testimony of Paul Kalmanovitz.)

A. Not whatsoever. He had an attorney for a while from Baltimore.

Q. Levin, L-e-v-i-n? A. Some name.

Q. Did he ever attempt to discuss the rights of Sherry Enterprises in connection with running those businesses?

A. No, that was in conjunction with liquidation.

Q. When did you end your affairs with Mr. Sherry? A. 1947.

Q. And up to that time did anyone ever sit down with you and attempt to represent Sherry Enterprises in connection with these businesses you have enumerated? A. None whatsoever.

Q. Then, do I understand, that the first time you heard it definitely said about Sherry Enterprises owning a part of this S & P partnership was at the criminal trial in 1952?

A. No, counsel, I believe Don Hughes mentioned to me years back, I mean, I have slight recollection on that subject.

Q. By the way, what participation did Mr. Sherry have [116] in actually managing these concerns that you have enumerated?

A. Oh, to a slight degree.

Q. Who actually did the managing?

A. I was the managing partner.

Q. Where was the main office?

A. 1539 North Vine Street.

Q. Did either Mr. Newton Sherry or Miss Margaret Sherry ever have an office or desk in that place? A. No.

(Testimony of Paul Kalmanovitz.)

Q. Did you ever see them in that place at any time?

A. Oh, most likely seen them in three, four years, a couple of times. Miss Sherry.

Q. Do you ever remember seeing Mr. Newton Sherry in that office?

A. Occasionally he would come in and see his father, rare occasions.

Q. Did he ever at any time ask to see the books of the S & P partnership to your knowledge?

A. No.

Q. Did he ever make any demands upon S & P for an accounting of any kind?

A. None whatsoever to my knowledge.

Q. Did Mrs. Ferguson, formerly Miss Sherry, ever make those demands?

A. Not to my knowledge. [117]

Q. And when you severed—terminated the partnership rather, that was in '47? A. '47.

Q. And did Mr. Newton Sherry at that time have anything to do with the termination of that partnership?

A. No, it was Mr. Sherry and his attorneys.

Q. Which Sherry? A. Senior.

Q. Nathan Sherry? A. That is correct.

Q. Did Mrs. Margaret Ferguson attend or have anything to do with that termination?

A. No.

Q. And the funds that were received, were there any funds received by the way, when you separated?

(Testimony of Paul Kalmanovitz.)

A. No. He received seven lots free and clear, and the Clover Club property free and clear.

Q. Who received it? A. Mr. Sherry.

Q. And were the deeds made out to your knowledge to whom?

A. That I don't remember. The attorneys prepared the papers.

Q. Were you in the negotiations?

A. I was. [118]

Q. And who did you negotiate with?

A. Mr. Sherry and his attorneys.

Q. And did ever one of these children attend one of the negotiations? A. No.

Q. And the settlement was that you would receive everything in the partnership, and in turn give to Mr. Nathan Sherry what now specifically?

A. Seven lots on La Cienega, and the Clover Club property; personal, building and real property.

Q. Is that all? A. That is all.

Q. Was Lucy's or Marguery Corporation ever an asset of the Sherry Enterprises?

A. Was not.

Q. Let me get that address—are you acquainted with the property at 1810 Courtney?

A. Don't even know where it is.

Q. Was that ever at any time an asset of S & P?

A. No.

Q. Never heard of it before? A. No.

Q. How about 647 North Irving Boulevard, was that ever an asset of S & P? A. Never. [119]

(Testimony of Paul Kalmanovitz.)

Q. Ever heard of it before?

A. Never did.

Mr. Carr: That is all.

Cross Examination

Q. (By Mr. Townsend): Did you ever hear of the Hollywood Recreation Company, Mr. Kalmanovitz? A. Oh, yes.

Q. Did you own a part of that?

A. Yes, the Hollywood Recreation was consisting of Nathan Sherry, myself and three Lyon Brothers. Originally was corporation or partnership. I don't know which one came first.

Q. How about Brooks Cafe?

A. Brooks Cafe, yes, that was on Sixth Street. That was Irving Fidler, Nathan Sherry and myself.

Q. How about the Silver Dollar Cafe?

A. That is in Pasadena. Originally belonged to Hollywood Recreation, and then subsequently S & P Company. Then, we sold it to Carl Smith.

Q. What year was that?

A. We acquired in 1933 or '34. I don't recall exactly. We had it a couple of years only, two or three years.

Q. To your knowledge, did Mr. Sherry keep on with the Silver Dollar Cafe? After you got out?

A. No, we got out together. Was awfully complicated operation and we sold it to Carl Smith. He passed away subsequent—got out at the same time.

Q. Now, Mr. Sherry attended considerable meetings of the S & P Company?

(Testimony of Paul Kalmanovitz.)

A. Oh, yes, he was there every day.

Q. Would you say that he represented his interests adequately?

A. Well, Mr. Sherry used to come down late in the afternoon. He stayed late at night and talked to customers and what have you. I did all the managing of it.

Q. You did the managing?

A. That is correct.

Q. And I believe you and Mr. Nathan Sherry had a falling out?

A. We had a disagreement of policies.

Q. I see, and you determined to break off relationships?

A. That is correct.

Mr. Townsend: I have no further questions.

Mr. Carr: Thank you. May he be excused, your Honor?

The Court: Yes.

(Witness excused.)

Mr. Carr: I have one more witness, your Honor, be very brief, Mr. Murphy.

(Short recess taken.) [121]

Whereupon,

JAMES F. MURRAY

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name and address for the record, please?

The Witness: James F. Murray, 126 Catherine Park Drive, Glendora.

Direct Examination

Q. (By Mr. Carr): What is your occupation?

A. I am an accountant.

Q. Were you acquainted with Mr. Nathan Sherry prior to his decease? A. I was.

Q. Were you associated with him in any way, Mr. Murray?

A. I was associated with him up to September 30, 1943, and from around March 15, 1949, as far as doing any accounting work.

Q. Did you make out the returns—were you acquainted with the partnership—I keep saying “partnership.” I assume the record will assume that I understand alleged partnership, with the partnership called Sherry Enterprises?

A. Was I acquainted with it? [122]

Q. Yes.

A. I knew that there was a so-called “partnership” formed. It was going to be formed, and it was going to be formed around October 1st, 1943, and at that time I was keeping the books for the Monticello Cafe, and the Hollywood Cafe. I turned them over to Hughes & Yessner in Hollywood.

(Testimony of James F. Murray.)

Q. Did you make out any returns for Sherry Enterprises, income tax returns?

A. Not during the period under question.

Q. When was the first time you made out a return?

A. In 1947.

Q. For what year was that?

A. That would have been for the year from July 1st, 1946 until June 30, 1947, I think.

Q. And did you make out any individual returns for Margaret Lillian Sherry?

A. I made the returns out after—in March of '47 for the year '46 off a partnership return that was prepared by Yessner & Hughes in Hollywood.

Q. I will show you here Exhibit B which purports to be—which is the copy of the individual return of Margaret Sherry for the year 1946. Is that right?

A. That is correct.

Q. Did you prepare that?

A. I prepared that off the partnership return that was [123] prepared by Yessner & Hughes.

Q. Who requested you to prepare that return?

A. At the time these books were turned over—these tax returns were turned over to me by Mr. Hughes without me being asked anything at all, and I, in turn, prepared the returns off of those tax returns in the file.

Q. What I am getting at, did Mrs. Ferguson, then Miss Margaret Sherry, did she request you to make up that return?

A. Not to my knowledge. They would have been

(Testimony of James F. Murray.)

made up on the request of Mr. Sherry if anyone requested, or Mr. Hughes.

Q. By the way, during 1945 where did you have an office?

A. I think at 606 South Vermont.

Q. And did Mr.—was Mr. Sherry in Lucy's at that time?

A. No, Lucy's wasn't bought until July 1st, 1947.

Q. And where did Mr. Sherry have his office in 1945, if you recollect?

A. Mr. Sherry's office, if you could call it an office, was with the S & P Company on Vine Street.

Q. Were you here when Mr. Kalmanovitz was testifying? A. Yes.

Q. Is that the place?

A. That is the place.

Q. Now, what did you do with this 1946 return, Exhibit B, after you prepared it, do you remember?

A. After that return was prepared, it was probably sent [124] over—that return was taken out to Elm Drive to be signed and the check to be picked up on it.

Q. Do you know who picked the check up?

A. I couldn't honestly say, Mr. Carr. Maybe someone from my office picked it up, one of my employees.

Q. Do you know who issued the checks?

A. Mr. Sherry.

Q. Which Mr. Sherry?

A. Mr. Nathan Sherry probably decided——

(Testimony of James F. Murray.)

The Court: You say he probably did issue them or he did issue them?

The Witness: They did. I probably got the checks from Mr. Sherry because I wouldn't have gotten them from Miss Sherry or Mr. Newton Sherry. I would have got no checks from either one of those two. I never have gotten any checks from those in payment of any taxes.

Q. (By Mr. Carr): Now, then, I will show you Exhibit D which is a return for 1946 of Mr. Newton Ivan and Lois Sherry. Did you prepare that?

A. Yes, we did. That was prepared by our office.

Q. When you say "we" you mean who?

A. I prepared these returns.

Q. Who requested you to prepare that return?

A. Mr. Sherry requested me. [125]

Q. Which Mr. Sherry?

A. Mr. Nathan Sherry, deceased, requested me to prepare these returns.

Q. When you had finished the preparation what, if anything, did you do with that return?

A. This return, Sherry was living at Elm Drive at that time.

Q. When you say "Sherry," I have to know which one.

A. Mr. Nathan Sherry was living at Elm Drive at that time, and I assume we went out to Elm Drive, had these signed and the checks were picked up.

Q. Do you have any recollection of it?

(Testimony of James F. Murray.)

A. I couldn't—I can say that we went out there. We had the returns signed and the checks picked up, Mr. Carr.

Q. Who signed the return, do you know?

The Court: You are speaking now with respect to Mr. Newton Sherry?

The Witness: Mr. Newton Ivan Sherry signed this return and Margaret Lillian Sherry signed this return.

Q. (By Mr. Carr): I am speaking now with respect—let's stay on the one. Let's stay on Exhibit D. Is that the one of Newton?

A. That is Newton Ivan Sherry, and Lois Sherry.

Q. Do you know who issued the check to pay the tax for that return? [126]

A. Those checks were issued by Mr. Sherry.

Q. Which Sherry?

A. Mr. Nathan Sherry.

Q. Were you ever consulted at any time by Mr. Newton Sherry about making up a return for him?

A. I have had no reason to consult with him.

Q. Did you ever?

A. No, I never consulted with Mr. Newton Sherry about the preparation of any return.

Q. At no time? A. At no time.

Q. Were you acquainted with the S & P Company?

A. I had a pretty fair knowledge of the S & P Company.

Q. You did some work for them, did you?

(Testimony of James F. Murray.)

A. After 1943 when they were buying all these locations I took quite a few inventories for them on the purchase of these places; Keith Jones in particular and the Hollywood Recreation Center, too.

Q. To your knowledge, and I speak with respect to your knowledge only, do you know whether Mrs. Ferguson, then Margaret Sherry, took any part in the management of first S & P?

A. She had no part in the managing of S & P Company.

Q. Any at all? A. None.

Mr. Townsend: I move to strike that, your Honor. [127] I don't think this witness is qualified to answer that.

Mr. Carr: He was keeping the books at one time, I thought he said.

Mr. Townsend: Was he a member of the management of the company?

Mr. Carr: Go ahead.

Mr. Townsend: I'd prefer to ask him on what he bases that knowledge.

Mr. Carr: All right.

The Witness: After the S & P Company, which was owned by Mr. Kalmanovitz and Mr. Sherry, started to buy quite a few locations, they came to me and asked me to take inventories in these various places. I was in the S & P Company at least once or twice a week. I know that Mr. Newton Sherry or Miss Margaret Sherry had nothing to do with the management of the place.

Q. (By Mr. Carr): Did you keep the books or

(Testimony of James F. Murray.)

supervise them, or what?

A. No, I didn't keep the books for the S & P Company.

Q. Did you supervise?

A. I didn't supervise the books.

Q. You were just making up the separate inventories?

A. Various inventories at various times when they purchased various places, yes.

Q. Now, when was it first drawn to your attention that [128] there was a supposed partnership, Sherry Enterprises?

A. At the time right prior to September 30, 1943. I was told by Mr. Sherry that there was going to be a partnership formed for me to close the books of the Monticello Cafe, the Hollywood Cafe, and turn over the books and balance sheets to Mr. Don Hughes, which I did.

Q. And after this date, did you keep your offices at the same place?

A. That is correct, yes.

Q. And did you continue to do anything—any business with Mr. Sherry, Nathan Sherry?

A. I knew that the gift tax return was filed. I knew what businesses were in that gift tax return.

Q. What activity, if any, did you have with Mr. Sherry after this partnership document came into existence, that is, in 1943?

A. Mr. Sherry showed me those documents, Mr. Carr, but as far as having any activity business with Mr. Sherry, I went out to the S & P Company

(Testimony of James F. Murray.)

and he told me at various times what was going on, what they were doing, what places they were buying, and things like that.

Q. As far as you knew—strike that. Let me see if I can put it this way.

What, if anything, did you observe about the management of S & P during the years 1945 and—who was [129] managing it?

A. Mr. Kalmanovitz was the manager of the S & P Company at all times. I knew Mr. Kalmanovitz——

Q. You have answered my question.

Now, then, in 1946 who was managing?

A. Mr. Kalmanovitz.

Q. What part was Mr. Nathan Sherry playing, to your knowledge?

A. Mr. Nathan Sherry told me in 1946 that he——

Q. You are not answering the question.

A. Mr. Sherry told me——

Q. What you saw or what you heard.

A. Mr. Sherry did not manage S & P Company in any way. He was just there as a good fellow to meet customers and things like that.

Mr. Townsend: Your Honor, respondent moves to strike that. I don't believe it is based on this man's own observation.

The Witness: I testified, I think, counsel, I was in places once or twice a week, and I saw——

The Court: I will not strike it. Much of this witness' testimony is of an unsatisfactory char-

(Testimony of James F. Murray.)

acter, and I am going to have to read it in the light of the conclusions I form of his testimony. [130]

Q. (By Mr. Carr): Well, now, Mr. Murray, if you will just be specific. I think you will help us. All I want to know, if you know of your own knowledge, what Mr. Sherry did with respect to S & P enterprises during 1944 and '45.

A. Mr. Sherry——

Q. Nathan Sherry I am talking about.

A. Mr. Nathan Sherry during those particular years was just, you might as well say, a front man. He met the customers, and talked to the customers. That is all he did as far as managing the S & P Company.

Q. Now, then, with respect to Sherry Enterprises, did you ever see a set of books for Sherry Enterprises? A. I saw the tax returns.

Q. Did you ever see a set of books?

A. No, I saw the tax returns is all. The answer is no.

Q. You prepared whatever these tax returns that you have mentioned merely from partnership tax returns? A. That is correct.

Q. Without looking at any books?

A. That's right.

Q. Did you ever at any time during the time——strike that.

How often would you see Mr. Nathan Sherry say during 1944?

A. I saw Mr. Sherry once or twice a week, Mr. Carr. [131]

(Testimony of James F. Murray.)

Q. And were you discussing business matters with him?

A. He told me—no, I did not discuss business matters with Mr. Sherry as far as the S & P Company. He told me what was going on.

Q. I am talking about business matters, any business matters. A. No.

Q. And where were you located?

A. The Hollywood office on Vine Street.

Q. Did you ever at any time see Mr. Newton Sherry in that office?

A. I never saw him, never.

Q. In '44, '45, did you ever see Margaret Sherry or Margaret Ferguson in that office in 1944 or '45?

A. Never.

Q. Now, I will ask you a very specific and direct question. First of all, I will withdraw that.

You were a very good friend of Mr. Sherry, weren't you? A. That is correct.

Q. Now, irrespective of that friendship, I understand that you now realize you are under oath and you will state the facts?

A. That is correct, sir.

Q. I want to ask you this: Did Mr. Sherry ever indicate [132] to you by word of mouth that he was forming this partnership, Sherry Enterprises, for the purpose of splitting up his taxes?

A. No, never, Mr. Carr.

Q. Did he ever indicate to you in any way why he was doing it? A. Never.

Q. You never asked him?

(Testimony of James F. Murray.)

A. I never asked him.

Q. Were you interviewed, by the way, by Mr. Burns? A. I was, yes.

Q. Did he ask you or inquire along the same lines that I am asking you now about whether there was a partnership or not?

A. That is correct.

Mr. Carr: That is all.

Cross Examination

Q. (By Mr. Townsend): Mr. Murray, I believe you stated that you made out some partnership returns for Sherry Enterprises?

A. That is right.

Q. What years did you make out those returns?

A. Probably '47, '48, '49, around there.

Q. Any others besides that?

A. I'd have to check the file.

Q. I suppose you can remember now, '47, '48, '49—— [133]

A. Probably up to '50, counsel, I'd have to check the file to find out.

Q. When you prepared those returns, did you file those returns yourself?

A. During those years I would have to go back and look at the records. We did keep during those years a record of every tax return filed and how they were filed. I know we have for the past five years. Prior to that, I don't know if we mailed a tax return out. We had a record in the office. We have done that for the past four or five years,

(Testimony of James F. Murray.)

whether or not the office mailed them, I don't know.

Q. As far as you were concerned when you were preparing these partnership returns, you felt this was a bonafide partnership?

Mr. Carr: I object to that on the ground it asks for a conclusion of the witness, your Honor, what he felt. That is the issue in question here.

The Court: I assume he either felt that or he was bordering on to some dangerously unprofessional conduct.

Mr. Carr: That may well be true, but it wouldn't be material in this case what he felt. It wouldn't bind the Court in any way. That is my point.

The Court: I certainly wouldn't be bound by it.

Mr. Carr: I know you wouldn't as a lawyer, but at the same time I don't think the record should have that in it. [134]

The Court: I will sustain the objection.

Q. (By Mr. Townsend): Very well, your Honor, I will try to rephrase the question.

Was there anything in any way or any time which Mr. Sherry or anybody else said that would lead you to believe that this was a fictitious partnership?

A. I don't think anyone said at any time or led me to believe that it was a fictitious partnership.

Q. That it was a fictitious——

A. I don't think anyone said anything to that effect.

Q. There was nothing then that would lead you

(Testimony of James F. Murray.)

to believe that this was a fictitious partnership?

A. I can't say it was a fictitious partnership.

Q. I am not asking you that, Mr. Murray. I am asking you was there anything to lead you to believe it was a fictitious partnership?

A. I don't think it was a fictitious partnership.

The Court: You are not answering the question.

The Witness: No.

Q. (By Mr. Townsend): Now, when you prepared these individual returns, for Newton Sherry and for Margaret Sherry, are you telling me that you didn't ask them if they had any other additional income? [135]

A. No, I opened up a set of partnership books in 1947. We continued on with this partnership set of records.

Q. What partnership are you speaking of?

A. I am talking about a continuation of the Sherry Enterprises.

Q. All right.

A. When this thing started under investigation, I went and opened up a set of records during all the time Mr. Burns was investigating and for what information I could gather, I opened up these books and records.

Q. When would you have done that?

A. After this investigation started, I had to go back and try to pick up the information and everything.

Q. This investigation was going on after 1947?

(Testimony of James F. Murray.)

A. It started in '47, the latter part of '47—no, the first part of '47.

The Court: And there hadn't been any books before that?

The Witness: I didn't see any books before that, your Honor, because I opened up a new set of records from all the information I could gather as I went along. In other words, I started and I had to go back and pick up previous information, in the bank statements I could find. Anything I could find that could be entered into a set of books or records and attempt to build up a set of records.

Q. (By Mr. Townsend): Well, now, you say that you prepared some books, now, what did you use those books for?

A. What did I use them——

Q. You didn't use them to prepare those income tax returns?

A. After I opened those books and records the information I had in those books and records I used to prepare the tax returns.

Q. Let me point out to you that these tax returns were filed on March 15, 1947. Is it your testimony that the information contained on those comes from books that you recreated in 1947?

A. No, no, if you have listened to my testimony before, counsel, I prepared these returns from income tax returns that Mr. Hughes had prepared.

Q. I see, and by the way, when you spoke of Don Hughes, you meant Herndon Hughes?

A. Herndon Hughes, yes, sir.

(Testimony of James F. Murray.)

Q. And was it your testimony that you didn't talk to either Newton or Margaret Sherry—about these returns?

Mr. Carr: Now, counsel, let me suggest you say which returns because that is where the confusion came.

Mr. Townsend: I am speaking about Exhibit B. He has only prepared two returns as I understand.

Mr. Carr: I know, but you asked him if I *may* so about later years after '47 is when the books were set up.

Mr. Townsend: It is well taken.

Mr. Carr: So, he was confused, I think, about later years.

Q. (By Mr. Townsend): I am talking about Exhibit B and Exhibit D which are right in front of you, Mr. Murray, which are the returns which you prepared?

A. These tax returns were turned over to me by Yessner & Hughes pretty close to the filing time, and I had no time to ask anyone any questions. I just prepared these tax returns from the tax returns that Yessner & Hughes had filed.

Q. I see, and you did not ask these parties if they had any other additional income?

A. No, I did not.

Q. Now, directing your attention to Exhibit D and in doing, would you show or state for the record what the income is shown thereon?

A. Shows the S & P Company, \$1950.00 and \$19,156.65, a total of \$21,106.85.

(Testimony of James F. Murray.)

Q. Where did you get the information about the \$1950.00?

A. Not having the partnership tax return, I assumed I got it off the tax return that was filed by Yessner & Hughes.

Q. Let's take a look at that. [138]

A. I will correct that. That is a salary item. That is the salary item that probably came when he worked down in Wilmington.

Q. I see. Where did you get that information?

A. Oh, without going back to the file, I couldn't answer that question.

Q. I mean obviously it didn't come from the partnership returns prepared by Mr. Hughes, isn't that correct?

A. Unless that information was in the file that was turned over to my counsel.

Q. Now, did you represent either Mrs. Ferguson or Mr. Newton Sherry when Mr. Propeck, Revenue Agent, was making investigation?

A. No, sir, Yessner & Hughes recommended.

Q. Mr. Murray, did you act as a trustee for either of the petitioners here?

A. Oh, I think we did act as a trustee.

Q. What was the approximate—what was the property that you were trustee of?

A. That was the Clover Club.

Q. That was the Clover Club that Mr. Nathan Sherry got out of his break-up, split up with the S & P Company, is that correct?

A. Yes.

(Testimony of James F. Murray.)

Q. Now, what happened to that property? [139]

A. I think the Clover Club burned down.

Q. Now, you said you were trustee of that property?

A. That is correct.

Q. Exactly who did you represent?

A. Who did I represent?

Q. Yes, as trustee, I mean. Who were the beneficiaries?

A. Well, Newton and Margaret Sherry were the beneficiaries, I assume, under that.

Q. And can you tell me approximately the amount of the assets of that trust as best you can recall?

A. No, I can't recall.

Q. You don't recall? You have no recollection whatsoever?

A. No.

Q. Do you know that a mortgage was held by that trust?

A. There wasn't—I don't think, Mr. Counselor, there was a mortgage held there by that trust.

Q. Now, did you ever distribute any assets or any particular income from that trust to either of the beneficiaries?

A. Of the beneficiaries?

Q. Yes.

A. No.

Q. What happened to it?

A. I imagine Mr. Sherry got all that money.

Q. Well, were you—weren't you trustee? [140]

A. I assume that I was, yes.

Q. But you didn't do anything about it?

A. No.

Q. You didn't represent the beneficiaries in any

(Testimony of James F. Murray.)

way? A. No.

Q. As far as you know, the trust vanished, is that correct? A. That is correct.

Q. Now, when you spoke about these various places that you went out to take inventories, I assume you are talking about these various clubs here which would be in different parts of the city?

A. Restaurants and bars, yes.

Q. That would not be the office of S & P Company?

A. Nowhere in the office of S & P Company. I did take an inventory that was the Hollywood Recreation Center.

Q. But all those inventories were at places apart from there?

A. They were apart and most of the time Mr. Kalmanovitz and Mr. Sherry were present.

Q. Did you take any inventories off at any office of Sherry Enterprises?

A. No, only the one inventory at the time of the purchase we took there, the Hollywood Recreation, that is for—that is where the office was. [141]

Q. The office of Sherry Enterprises?

A. Was in the Hollywood Recreation. I took the original inventory.

Q. You were only there once?

A. Only as far as doing any business, yes.

Mr. Townsend: I have no further questions.

Redirect Examination

Mr. Carr: May I ask one or two further questions?

(Testimony of James F. Murray.)

Q. (By Mr. Carr): You were pretty well acquainted with Mr. Nathan Sherry?

A. About 38 years.

Q. Where did Mr. Sherry come from?

A. Baltimore, Maryland.

Q. What was his business?

A. Mr. Sherry at that time was in the newspaper business.

Q. He was a circulation builder?

A. Circulation man, that is right.

Q. He moved over to Chicago and helped build circulation there? A. Seattle.

Q. Those were the good old strong armed days, circulation strong arm days?

A. That is right. [42]

Q. Mr. Sherry was a rather domineering type of man, was he? A. He was.

Q. And if Mr. Sherry told the children to do something, did they usually do it?

A. They did it.

Q. Was there ever any questions asked?

A. Never any question asked.

Q. As a matter of fact, when Mr. Sherry was around his place of business with you folks, did any of you question him?

A. No, we never questioned him.

Q. When he asked you to do something, what was done?

A. Mr. Carr, if you are speaking as far as his children are concerned, I'd say when he asked them to do anything, they did it.

(Testimony of James F. Murray.)

Q. Well, did he ask them or tell them?

A. He told them to do it.

Q. When he told his employees, would he ask them or tell them?

A. No, he told them what to do. He didn't ask them any questions.

Mr. Carr: I think that is all.

Recross Examination

Q. (By Mr. Townsend): Mr. Murray, did you live with the Sherry's at any [143] time?

A. Back in 1937 I think we lived with Mr. Sherry in Westwood for probably nine months, I'd say, counsel.

Q. Other than that period——

A. No, we never lived with them. I knew him very well, but I never lived with him.

Q. I take it from this period in 1943 there on in, you were self-employed?

A. I was in business for myself.

Q. You had other clients besides Mr. Sherry?

A. That is right.

Mr. Townsend: That is all.

Mr. Carr: That is all. Thank you very much.

May he be excused?

The Court: Yes.

(Witness excused.)

Mr. Carr: That finishes petitioner's case, your Honor.

Mr. Townsend: Respondent calls Mr. Burns.

Whereupon,

WILLIAM B. BURNS

called as a witness for and on behalf of the Respondent, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name and address [144] for the record, please?

The Witness: William B. Burns, B-u-r-n-s, San Marino, California.

Direct Examination

Q. (By Mr. Townsend): What is your position, Mr. Burns?

A. I am with the Intelligence Division of Internal Revenue Service.

Q. And what was your position in November of 1949?

A. I was a special agent of the Intelligence Unit, as it was called at that time.

Q. And what connection have you had with this case?

A. It was assigned to me for investigation as special agent, a joint investigation with Internal Revenue Agent Gordon B. Keller.

Q. During your investigation of that case, did you have any occasion to take sworn statements of either of the petitioners here?

A. Yes, I did, sir.

Q. Did you take such a statement of Mr. Newton Ivan Sherry? A. Yes, sir.

Q. Do you recall the date of that?

(Testimony of William B. Burns.)

A. Not exactly but it was in the fall of '49.

Q. And where was that statement? [145]

A. Room 844 of this building.

Q. Of this building, and was Mr. Sherry under oath at that time? A. Yes, sir.

Q. At that particular question-and-answer statement, was this question asked by you and did Mr. Newton Ivan Sherry answer as follows:

“Q. Are you a partner in the partnership known as Sherry Enterprises? A. I am.”

Mr. Carr: I will stipulate, counsel, and save you the time that the answers made in that document were made by Mr. Newton Sherry, to save you reading them, and have the witness testify. I assume that you represent that that is a correct document and upon your representation I will so stipulate.

Mr. Townsend: Yes, sir.

Mr. Carr: If that is satisfactory.

Mr. Townsend: You want the document to go in?

Mr. Carr: No, no, no, I meant you could read them without putting the questions to the witness.

Mr. Townsend: Oh, fine.

Q. (By Mr. Townsend): The next question was asked by Mr. Burns and answered by Mr. Newton Ivan Sherry: [146]

“Q. In your opinion, what was the purpose of the formation of Sherry Enterprises partnership?

“A. Well, the formation, in other words, is between all of us. The money was put in in case anything should happen to my dad, we would still have

(Testimony of William B. Burns.)

a partnership, there was money that was left to us that made up the partnership. Also, there was money I invested that made up the partnership.”

The following question was asked by Mr. Burns and answer given by Mr. Newton Ivan Sherry:

“Q. Since the formation of Sherry Enterprises has there ever been a meeting of all the four partners in which business policies and plans were discussed?

“A. Well, at different times, if ever we wanted any type of business whatsoever added to the Sherry Enterprises, we would all get together and have a mutual agreement.”

That completes the questions and answers, and I believe our stipulation is that those questions were asked and the answers were as given by Mr. Newton Ivan Sherry.

Mr. Carr: So stipulated.

Mr. Townsend: With that, I am through with this witness. [147]

Cross Examination

Q. (By Mr. Carr): Just a couple of questions.

Mr. Burns, I believe you and I have met before, haven't we, Mr. Burns?

A. We have, yes, sir.

Q. And, Mr. Burns, you were on this investigation for a long time, weren't you?

A. Not as we consider a long time.

Q. How long a time, approximately?

A. Well, we started it in 1947, and it is still

(Testimony of William B. Burns.)

going on, I believe, it could be successfully said. This is '57.

Q. Mr. Burns, when you first started out investigating this case, you were proceeding on the theory that there was an invalid partnership, is that right?

A. We endeavored to proceed on no theory. We endeavor to gather facts. I had no preconceived theory as to the case until we had completed our report.

Q. Well, perhaps I put it wrongly. Weren't you pursuing or at least making the effort to obtain from the Sherry's, Nathan Sherry, these two children, this girl and boy, the fact that this was a fictitious partnership? Weren't you making that effort at the time to establish that fact?

A. No, sir, I was endeavoring to get the facts, sir. [148]

Q. But you were pressing very hard on the proposition as to whether or not it was a valid partnership, weren't you, in fact?

A. No harder on that than on any other fact involved in the——

Q. Well, if you remember at what time did you decide in your own mind that there was actually a partnership?

A. I would not be able to fix that definite point of time. I don't believe I could, Mr. Carr.

Q. Well, now, you went to trial in the criminal case in 1952.

A. It would be prior to that.

(Testimony of William B. Burns.)

Q. That was about August of 1952?

A. I assume you are correct in that regard.

Q. And you testified in that case, did you not?

A. I believe I did, yes. I know I did.

Q. At some length, and you testified as to your findings, did you not, respecting partnership matters? A. Yes.

Q. And at that time you did not testify either way, that you had found a partnership or had not found a partnership, is that correct, or do you remember?

A. My present recollection doesn't include any testimony concerning the validity or non-validity of that partnership. [149]

Q. When you were questioning this boy, Newton Sherry, did he have counsel with him?

A. He did, sir.

Q. And who was his counsel?

A. Conrad Hubner.

Q. And you were questioning him about many other things in addition to this partnership, is that correct? A. Yes.

Q. And at that time you also questioned the girl and took her statement, or close to that?

A. Yes.

Q. And you questioned her about this partnership? A. Yes.

Q. Now, here is what I am coming to. During the questionings, you oftentimes have little off-the-record discussions, don't you?

(Testimony of William B. Burns.)

A. I would not say oftentimes, occasionally, sometimes, yes, sir.

Q. In other words, you reach a point when you are taking a statement when you say, "Off the record for a few moments" and you discuss something. Did you do that in this particular case when you were taking the statement of Newton Sherry?

A. I'd have to refresh my recollection to answer that whether it took place or not. It would be my guess that it [150] did if you want my guess.

Q. Well, I will take your guess, and I take it that guess is based on some recollection, some maybe faint recollection in your mind?

A. No, sir, not particularly as to that interview, but as to what happens in most interviews.

Q. Well, let me see if I can refresh your recollection. Do you recollect that when you were discussing the partnership feature with Mr. Newton Sherry on an off-the-record discussion that you made the statement, in substance and effect, I don't know that these are exact words: Now, Mr. Sherry, you know that that partnership was set up for only one purpose, that was to avoid tax. Do you remember making a similar statement?

A. I do not.

Q. You don't remember him making an answer that his father told him that it was set up to protect the children?

A. Well, that answer is recorded. I am quite sure.

Q. You don't remember the other part? Do you

(Testimony of William B. Burns.)

ever remember hearing the daughter or Newton make that statement in answer to a question by you or a statement by you that wasn't it a fact that this partnership deal was phony. It was set up purely for the purpose of avoiding taxes?

A. You have got several things in there.

Q. Maybe I have. I will clarify that.

Do you ever remember a statement made by you to [151] Margaret Sherry at which time you said, in effect, Now, you know that this partnership is phony. It was set up only for the purposes of evading taxes or avoiding taxes, and she said, in substance and effect, "Well, I don't know much about it, but my dad told me it was set up for the purpose of protecting us children."

A. Now, what is your question?

Q. Did you ever remember that occurring?

A. No, sir.

Q. Never occurred to your knowledge?

A. There is a recorded statement by her, and I believe also by Mr. Newton Sherry to the effect that the partnership, one of the reasons for the existence of the partnership, was for the protection of their interests.

Q. How many times would you say you talked to Margaret Sherry that was not recorded?

A. How many times?

Q. Yes.

A. Something less than five, I would think.

Q. More than two but less than six?

A. I think more than two.

(Testimony of William B. Burns.)

Q. And how many times would you say you talked to Newton Sherry when those conversations were not recorded?

A. Oh, that is very difficult for me to recall definitely. [152]

Q. Just give me an approximation.

A. But——

Q. Approximately.

A. I can recall at the moment just once, but there may have been one or two other times.

Q. Well, I am just about finished. Do you recollect having two or three conversations with Mr. Newton Sherry and then him bringing this lawyer to give the statement at the time it was given under oath?

A. Your question is do I recollect having talked with him before the statement was taken?

Q. Yes, before he brought a lawyer in?

A. I'd have to refresh my recollection from my notes to be sure as to that.

Q. Mr. Burns, let me ask you this: Don't you recollect saying something to the effect that if this was a phony partnership that it would, in effect, be a conspiracy?

A. This I do recollect, Mr. Carr, that I never used the word "phony" with regard to the partnership.

Q. All right. Did you ever indicate in any way by word of mouth to Mr. Newton Sherry that if this partnership was formed for the purpose of evading

(Testimony of William B. Burns.)

taxes, that he, himself, might find himself in trouble?

A. That I said that to Mr. Sherry, I have no recollection. I very seriously doubt that I did. [153]

Q. You didn't give him anything as far as you remember, anything to believe that he might be in trouble because of this alleged partnership, this splitting of income?

A. No, not—I certainly have no recollection whatever, and if I recall, Mr. Carr, I made an explanation both to Miss Margaret Ferguson and I believe Mr. Newton Sherry, but at least Mrs. Ferguson, were used as government witnesses in the trial, as I recall.

Q. They were subpoenaed, weren't they?

A. They were used as witnesses. How they were secured, I just can't be sure.

Q. Well, then, I take it, Mr. Burns, concluding that I can rest assured that you said nothing at any time which would lead either one of these—Mrs. Ferguson or Mr. Newton Sherry to believe that they were under investigation themselves?

A. I am in no position to testify as to what something I may have said caused them to reach a conclusion.

Q. Were you investigating them at the time?

A. As partners of Sherry Enterprises?

Q. You are attached to the Special Intelligence Unit, aren't you?

A. I was, yes, sir.

Q. And they handle criminal matters, don't they?

(Testimony of William B. Burns.)

A. As well as tax matters, yes, sir.

Q. But it doesn't usually come into your hands until [154] it gets in the fraud?

A. But in the course of that investigation, I call attention to the fact that it was a joint investigation, and at that time I was working jointly with Internal Revenue Agent Keller.

Q. But you were in charge?

A. Technically, yes.

Q. And the thing I am trying to find out, were you investigating Newton Sherry and Margaret Sherry at the same time you were investigating Mr. Nathan Sherry?

A. I suppose that could be answered affirmatively, yes, sir.

Mr. Carr: That is all.

Redirect Examination

Q. (By Mr. Townsend): Just one or two questions. Now, Mr. Burns, during your examination you were primarily interested in digging out the facts, is that correct? A. Yes, sir.

Q. Now, on the basis of your examination of this entire case, did you make any recommendation as to whether or not this partnership should be recognized? A. I did, sir.

Q. And what was that recommendation?

A. That it be recognized. [155]

Q. And what was that recommendation based upon?

A. There were at that time a number of family

(Testimony of William B. Burns.)

partnership decisions. I can't just at the moment recall the nature of them. There were two leading cases that were settled at about that time. I just can't recall the name of them.

Q. Was it also based on the examination and the fact that you had—that were disclosed to you during the examination? A. Yes, sir.

Mr. Townsend: I have no further questions.

Recross Examination

Q. (By Mr. Carr): Now, Mr. Burns, you say you recommended that the partnership be recognized, what date?

A. You mean what date did I make that recommendation?

Q. Yes.

A. It would be the date of my final report. I can't just recall that at the moment. I can refresh my recollection in a few minutes if you wish me to.

Q. That was before the criminal trial, wasn't it?

A. The report was written before the criminal trial, yes, sir.

Q. Isn't it a fact that the reason you made that recommendation was to eliminate that from the criminal case [156] so that there would be no question involved of partnership in the trial of the criminal case?

A. That is not the reason.

Q. At any time, did any of the children have any basis like that at all?

(Testimony of William B. Burns.)

A. It might have been, probably was one of the facts that entered into the consideration.

Q. Isn't it a fact, Mr. Burns, that you discussed this very feature with your associates, and in discussing it said, in effect, I wasn't there, but I am going to guess, in effect, we better eliminate this partnership issue because we have got plenty else on the man and we don't want to get all his partnership involved in the criminal trial. Isn't that about the substance of it?

A. Well, I don't think so.

Q. Well, now, you say you don't think so. It is pretty close, isn't it?

A. We considered it both ways, of course, but the facts were overwhelming, and the testimony was complete that a partnership did exist.

Q. I am just about finished, and I don't want to pin any bouquets on myself, but didn't you at that conference say well, this fellow Carr——

A. Which conference are you speaking of?

Q. When you were speaking of or discussing the [157] partnership in the criminal case, this fellow Carr will get a hold of that partnership and he will wind it up in a knot and give us trouble. Let's get it out of the criminal case.

A. I could not—it could not have been because you were not the attorney at the time.

Q. It wasn't about not winding it up in the criminal case?

A. No, we didn't discuss it from that standpoint.

(Testimony of William B. Burns.)

Q. You discussed it from the point of view that it would complicate the criminal prosecution?

A. No, sir.

Q. Not at all? A. No, sir.

Q. Just made it up solely on the merits and said we have concluded there was a partnership?

A. Yes, sir.

Q. How much time did you spend trying to prove that there wasn't a partnership?

A. I spent no time trying to prove anything in our investigations, Mr. Carr.

Q. You were just out to find out the truth?

A. That's right.

Mr. Carr: That is all.

Mr. Townsend: That is all.

Mr. Carr: Are you finished, counsel? [158]

Mr. Townsend: Just one thing. At this time respondent offers Exhibit K and L for identification in evidence.

Mr. Carr: Are those the signed——

Mr. Townsend: Yes.

Mr. Carr: We have no objection.

The Court: May be admitted.

The Clerk: Exhibits K and L.

(The documents above-referred to were received in evidence and marked Respondent's Exhibits K and L.) [159]

* * * * *

[Endorsed]: T.C.U.S. Filed May 8, 1957.

[Endorsed]: No. 16109. United States Court of Appeals for the Ninth Circuit. Margaret Lillian Ferguson, Newton Ivan Sherry and Lois Sherry, Petitioners, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Petition to Review a Decision of The Tax Court of the United States.

Filed: July 22, 1958.

Docketed: July 24, 1958.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 16109

MARGARET LILLIAN FERGUSON,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

NEWTON IVAN SHERRY and LOIS SHERRY,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

STATEMENT OF POINTS ON WHICH AP-
PELLANTS INTEND TO RELY

Appellants hereby state that the points on which they intend to rely on the appeal in this action are as follows:

1. The findings of fact, conclusions of law, and decisions of the Tax Court of the United States are not supported by the evidence.

2. The decisions of the Tax Court of the United States are contrary to law.

3. Errors occurred at the trial in the admission and rejection of evidence.

Dated at Los Angeles, California, this 23rd day of July, 1958.

/s/ CHARLES H. CARR,
Attorney for Petitioners

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 24, 1958. Paul P. O'Brien,
Clerk.

[Title of Court of Appeals and Cause.]

APPELLANTS' DESIGNATION OF RECORD ON APPEAL

Pursuant to Rule 75, Federal Rules of Civil Procedure, and Rule 17 of the Rules of this Court, the appellants, Margaret Lillian Ferguson, Newton Ivan Sherry, and Lois Sherry, hereby designate the parts of the record on appeal which they consider necessary for the consideration of the points on which they intend to rely on the appeal. (For the convenience of the Clerk, the document numbers referred to hereinafter are the document numbers supplied to this Court by the Clerk of the Tax Court of the United States in his transmittal letter of July 17th, 1958.)

1. Docket entries, Case No. 56085 (Document No. 1).
2. Docket entries, Case No. 56086 (Document No. 2).
3. Petition, Case No. 56085 (Document No. 3).
4. Answer, Case No. 56085 (Document No. 5).

5. Reply, Case No. 56085 (Document No. 6).
6. Petition, Case No. 56086 (Document No. 8).
7. Answer, Case No. 56086 (Document No. 10).
8. Reply, Case No. 56086 (Document No. 11).
9. Minutes of proceedings before the Tax Court of the United States (Document No. 16).
10. Stipulation of Facts, with Respondent's Exhibits A through J attached (Document No. 17).
11. Official record of proceedings before the Tax Court of the United States (Document No. 19), eliminating therefrom: Pages 1 to 6, inclusive; Lines 1 to 8, page 7; Page 159, line 12 to bottom of page; and Pages 160 to 164, inclusive.
12. Respondent's Exhibits K, L, and M, admitted in evidence (Document No. 18).
13. Memorandum Findings of Fact and Opinion (Document No. 23).
14. Decision, Case No. 56085 (Document No. 26).
15. Decision, Case No. 56086 (Document No. 27).
16. Petition for Review (Document No. 28).
17. Designation of Contents of Record on Review (Document No. 29).

Dated: July 23rd, 1958.

/s/ CHARLES H. CARR,
Attorney for Petitioners

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 24, 1958. Paul P. O'Brien,
Clerk.